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DOCKET ENTRIES

United States District Court for the District of Maryland

1968

Oct. 24—Complaint, filed.

Oct. 24—Motion of Plaintiffs for Temporary Restraining Order and Preliminary Injunction; Affidavits, and to convene Three Judge Court, filed.

Oct. 24—Notification and Request to Designate a Three-Judge Court (Thomsen, C. J.), filed.

Oct. 25—Designation of Three-Judge Court (Haynsworth, C. J. — Fourth Circuit).

Oct. 25—Answer of Defendants Rose K. Dawson and Marie M. Garber, filed.

Oct. 25—Plaintiff's Memorandum of Facts and Law, Statement of Facts, filed.

Oct. 25—Hearing on Motion of plaintiffs for Temporary Restraining Order and Preliminary Injunction, before Winter, Circuit Judge, Thomsen, C. J., Harvey, J.

Oct. 25—Appearance of Charles R. Richey, Esquire, (as Amicus Curae for the Republican State Central Committee for Montgomery County, Maryland, Order), filed.

Oct. 25—Argued and held sub-curia.

Oct. 28—Opinion and Order of Court, (Thomsen, C. J.) that Rose K. Dawson and Marie M. Garber, Members of the Permanent Board of Registry for Montgomery County, Maryland, be and they are hereby enjoined from removing the names of Tillye Cornman, Herbert Tabor, Celia White Tabor, Mary D. Pratt, Reynold R. Holliday, Elizabeth J. Holliday, Chris A. Hansen, Mary E. Hansen, Carlos Schultz and Frances Legallais from the voters' registry in Montgomery County, until further order of this Court, or from denying them the right to vote at the election on November 5, 1968, and are hereby required to restore to the voters'

registry the name of Frances Legallais if it has been removed. This order does not require defendants to register Edward Tabor and Elliot Vesell, filed.

Nov. 26—Stipulation between counsel extending time of Plaintiffs to file briefs to December 20, 1968 and approval of Court (Thomsen, C. J.) thereon, filed.

Dec. 20—Defendants Memorandum and attachments, filed.

Dec. 26—Stipulation between counsel, re: Facts, filed.

1969

Jan. 2—Appearance of George W. Liebmann, Esquire as attorney for Defendants, Order filed.

Jan. 2—Case tried before the Court, Winter, Circuit, J.; Thomsen, C. J. and Harvey, J.

Jan. 2—Argued and held Sub-Curia.

Jan. 11—Stipulation between parties concerning tax burden borne by real property in Montgomery County, Maryland, &c, filed.

Jan. 29—Opinion of Court (Winter, Circuit Judge) Thomsen, Chief Judge District Court and Harvey, District Judge, filed.

Feb. 19—Order (Winter, Cir. Judge; Thomsen, Ch. Judge and Harvey Dist. Judge) that defendants are permanently enjoined from removing the names of Tillye Cornman, Herbert Tabor, Celia White Tabor, Mary D. Pratt, Reynold R. Holliday, Elizabeth J. Holliday, Chris A. Hansen, Mary E. Hansen, Carlos Schultz and Frances Legallais from the voters' registry in Montgomery County, as therein more particularly set forth; and that defendants cease and desist from refusing to place the names of Edward Tabor and Elliot Vesell on said voters' registry, etc., filed. (Notices mailed 2/20/69).

Mar. 18—Motion of Francis B. Burch, Attorney General of Maryland, and William Evans, Marshall W. Jones, Jr. and Betty M. Silbert, members of the Board of Supervisors of Elections of Baltimore City to Intervene as parties defendant herein, and proposed answer, filed.

April 10—Order (Harvey, J.) granting leave to Francis B. Burch, Attorney General of Maryland and William Evans, Marshall W. Jones, Jr. and Betty M. Silbert, etc. to intervene as party defendants herein, filed.

April 10—Answer of William Evans, Marshall W. Jones, Jr. and Betty M. Silbert, etc. and Francis B. Burch, Attorney General, filed.

April 14—Notice of Appeal of Defendants, Francis B. Burch, Attorney General of Maryland and William Evans, Marshall W. Jones, Jr., and Betty M. Silbert, members of and constituting the Board of Supervisors of Elections of Baltimore City, to the Supreme Court of the United States, filed. (copies mailed by counsel.)

June 9—Transcript of Proceedings before the Court (Winter, Cir., J., Thomsen, C. J., and Harvey, J.) on October 25, 1968, filed. (filed separately.)

June 9—Transcript of Proceedings before the Court (Winter, Cir., J., Thomsen, C. J. and Harvey, J.) on January 2, 1969, filed. (filed separatelv.)

United States District Court for the District of Maryland

Civil Action No. 20028

Tillye Cornman, et al.,

Plaintiffs,

v.

Rose K. Dawson, Member of the Permanent Board of Registry for Montgomery County, Maryland, et al.,

Defendants.

COMPLAINT

(For Injunctive and Declaratory Relief)

1. This is an action for declaratory and injunctive relief to enforce the plaintiffs' right to register and vote in

the State of Maryland and to redress the deprivation under color of law of the State of Maryland of rights, privileges and immunities secured to plaintiffs under the Constitution of the United States. Jurisdiction is conferred on this Court by sections 1343, 1357, 2201 and 2202 of Title 28 of the United States Code and sections 1983 and 1988 of Title 42 of the United States Code. As more fully appears hereinafter, the action seeks to restrain the enforcement or execution of an order made by an administrative board acting under certain provisions of the Constitution and Code of Laws of the State of Maryland upon the ground that these provisions as interpreted by the defendants are unconstitutional and plaintiffs are requesting the convening of a Three Judge District Court to grant such relief, as provided under 28 U.S.C. §§2281-2284.

2. Plaintiffs are citizens of the United States and the State of Maryland, they have been bona fide residents of the State of Maryland for at least one year and of Montgomery County for at least six months, and they satisfy the qualifications for registration and voting under the Election Laws of the State of Maryland.

3. Plaintiffs Tillye Cornman, Mary D. Pratt, Herbert Tabor, Celia White Tabor, Reynold R. Holliday, Elizabeth J. Holliday, Chris A. Hansen, Mary E. Hansen, Carlos Shultz, and Frances Legallais are civilian employees (or spouses of civilian employees) of the Federal Government employed at the National Institutes of Health located in Montgomery County, Maryland, and all of the plaintiffs occupy living quarters located on the grounds of the National Institutes of Health. The Federal Government does not exercise or enjoy exclusive jurisdiction over plaintiffs or the places at which they live; plaintiffs are required to and do pay State and County income taxes, sales and use taxes, fuel taxes and motor vehicle registration and operator's license fees; they are subject to the jurisdiction of the State and local courts to the same extent as other residents of the State and County, and ordinances of the State and County are applicable to them in all material respects substantially to the same extent as to other residents of the State and County.

4. Defendants are the members of the Permanent Board of Registry for Montgomery County, Maryland and are charged by law with the duty to register and maintain on the voters registry the names of all eligible applicants for registration in said County.

5. Plaintiffs Tillye Cornman, Mary D. Pratt, Herbert Tabor, Celia White Tabor, Reynold R. Holliday, Elizabeth J. Holliday, Chris A. Hansen, Mary E. Hansen, Carlos Shultz, and Frances Legallais, after complying with all the Elections Laws of Maryland, were duly registered on the voters registry in Montgomery County, Maryland prior to October 19, 1963. Plaintiffs Edward Tabor and Elliot Vesell, after having reached the age of 21 and being otherwise qualified to register and vote under the Election Laws of Maryland, have duly applied for registration in Montgomery County, Maryland.

6. On or about October 19, 1968, the defendants acting as and on behalf of the Permanent Board of Registry of Montgomery County, Maryland, advised plaintiffs Tillye Cornman, Mary D. Pratt, Herbert Tabor, Celia White Tabor, Reynold R. Holliday, Elizabeth J. Holliday, Chris A. Hansen, Mary E. Hansen, Carlos Shultz, and Frances Legallais that their names would be removed from the voters registry in Montgomery County solely for the reason that the plaintiffs "reside on Federal property within Montgomery County and, as such, do not qualify for voting in Maryland under the State Constitution." Said defendants in the same capacity, have refused to register plaintiffs Edward Tabor and Elliot Vesell for the same reason.

7. Said action on the part of defendants will cause plaintiffs to suffer irreparable injury for which they have no adequate remedy at law in that it will deprive plaintiffs of the right to vote in elections for National, State and local offices scheduled to take place on November 5, 1968 and thereafter.

8. In taking said action, defendants purported to be acting under the provisions of Article I, section 1 of the Constitution of Maryland and statutes thereunder as construed by a decision of the highest court of Maryland.

9. Defendants' aforesaid conduct and the provisions of the Maryland Constitution and statutes under which the defendants purported to act violate the rights of the plaintiffs under the Constitution of the United States including the Equal Protection Clause of the Fourteenth Amendment in that, among other things:

(a) They deny to persons otherwise qualified and who are in fact residents of the State of Maryland and Montgomery County the right to an equal opportunity for political representation in the legislative and executive branches of the National, State and local government.

(b) They are based upon a classification of persons eligible to vote which has no reasonable relationship to any lawful purpose which may be served by the Election Laws of Maryland.

(c) They constitute invidious discrimination against the plaintiffs.

(d) They deny to plaintiffs their privileges and immunities as citizens of the United States and of the State of Maryland.

Wherefore, plaintiffs pray that a special Three Judge Court be convened to hear and determine this cause and that judgment be entered in favor of the plaintiffs as follows:

(1) Declaring that the plaintiffs Tillye Cornman, Herbert Tabor, Celia White Tabor, Edward Tabor, Mary D. Pratt, Elliot Vesell, Reynold R. Holliday, Elizabeth J. Holliday, Chris A. Hasen, Mary E. Hansen, Carlos Shultz and Frances Legallais may not be removed from the voters' registry in Montgomery County or be denied the right to register and vote by the defendants solely because they reside at places located on Federal property within Montgomery County, Maryland.

(2) Enjoining the defendants, and each of them, preliminarily and permanently, from removing any of the aforesaid plaintiffs' names from the voters' registry in Montgomery County or denying them the right to register

and vote solely because they reside at places located on Federal property within Montgomery County, Maryland.

(3) Directing the defendants, and each of them, to restore to the voters' registry in Montgomery County and to register any of the plaintiffs whose names have been removed from the voters' registry or whose registration has been refused solely because they reside at places located on Federal property within Montgomery County, Maryland.

(4) Granting plaintiffs such other and further relief as may be just and proper.

(Signatures of counsel.)

United States District Court for the District of Maryland

ANSWER

The Answer of Rose K. Dawson and Marie M. Garber, Defendants, to the Complaint heretofore brought against them in the above-captioned matter respectfully represents:

1. They admit the jurisdiction of this court as alleged in Paragraph 1 of said Complaint.

2. They admit that the Plaintiffs are citizens of the United States but deny that they are citizens or residents of the State of Maryland in satisfaction of the qualifications for registration and voting under the election laws of the State of Maryland.

3. They admit that portion of Paragraph 3 of said Complaint which alleges that certain of the Plaintiffs are occupying living quarters located on the grounds of the National Institutes of Health in Montgomery County, Maryland, and say further that such Plaintiffs are, in fact, residents of the federal reservation constituted by the grounds of the National Institutes of Health. The allegation that

the federal government does not exercise or enjoy exclusive jurisdiction over Plaintiffs or the places at which they live is a legal conclusion of the Plaintiffs but, controverting the same, these Defendants refer the court to the provisions of the Annotated Code of Maryland (1964 Replacement Volume), Article 96, Section 34 (Acts of 1953, Chapter 158) under which the State of Maryland consented to the acquisition by the United States of a certain tract of land therein described, comprising 317.7 acres, for the "National Institutes of Health — Montgomery County, Maryland". Subsection (b) of said Section 34 specifically provides that exclusive jurisdiction over that parcel of land "shall be and the same is hereby ceded to the United States for all purposes except that the State retains the right to serve thereon all civil and criminal process of the courts of this State". The final condition of said Section 34 regarding the actual acquisition of the site by the United States has been satisfied.

Further answering said Paragraph 3, Defendants admit that the Plaintiffs are required to and do pay State and county income taxes, sales and use taxes, fuel taxes and motor vehicle registration and operator's license fees to the State of Maryland but say further that the imposition of such taxes is attributable either to special Congressional permission or to taxable incidents unconnected with the residency of the Plaintiffs on a federal reservation.

Further answering said Paragraph 3, Defendants say that the fact that the Plaintiffs are subject to the jurisdiction of the State and local courts and to the application of ordinances and laws of the county and State "in all material respects substantially to the same extent as to other residents of the State and county" necessarily has no reference to the conduct and activities of Plaintiffs upon the confines of the federal reservation on which they reside, since the exception to the State's grant of jurisdiction contains only the exception mentioned above as to the right of the State to serve process of the courts therein. In proper context, therefore, the allegations as to the jurisdiction of the courts and the application of the laws of this State and its subdivisions are immaterial to the issue before the court.

4. They admit the allegations of Paragraph 4 of said Complaint.

5. They deny the allegation contained in the first sentence of Paragraph 5 that certain of the Plaintiffs "after complying with all of the election laws of Maryland, were duly registered on the voters' registry in Montgomery County, Maryland, prior to October 19, 1968", but say on the contrary that, although some of the Plaintiffs were so duly registered in compliance with the election laws at some time prior to October 19, 1968, immediately prior to that date such Plaintiffs were no longer residents of the State of Maryland and, therefore, did not have the ability to comply contemporaneously with the election laws of Maryland.

They admit the allegation of the second sentence of said paragraph as to the application of the Plaintiffs Edward Tabor and Elliot Vesell but deny that said Plaintiffs are qualified to register and vote under the election laws of Maryland.

6. They admit the allegations of Paragraph 6 of said Complaint.

7. They admit the allegations of Paragraph 7 of said Complaint.

8. They admit the allegations of Paragraph 8 of said Complaint.

9. The allegations of Paragraph 9 of said Complaint amount to legal conclusions by the Plaintiffs but these Defendants controvert them, and these Defendants say that the conclusions therein expressed incorporate erroneous conclusions of fact.

Wherefore, having fully answered the said Complaint, the Defendants pray that the same may be dismissed with costs to the Plaintiffs.

(Signatures of counsel and certificate of service.)

United States District Court for the District of Maryland

INITIAL OPINION

Thomsen, Chief Judge:

The twelve plaintiffs in this case are citizens of the United States who reside on the grounds of the National Institute of Health, a federal reservation in Montgomery County, Maryland. Prior to October 19, 1968, ten of the twelve plaintiffs were registered on the voters' registry in Montgomery County. On or about that date defendants, who are the members of the Permanent Board of Registry of Montgomery County, notified the ten that their names would be removed from the voters' registry in that County before the general election to be held on November 5, 1968, solely for the reason that they "reside on Federal property within Montgomery County and, as such, do not qualify for voting in Maryland under the State Constitution". See Article 1, section 1 of the Maryland Constitution, and *Royer v. Board of Election Supervisors for Cecil County*, 231 Md. 561, 191 A. 2d 446 (1963). For the same reason defendants have refused to register the other two plaintiffs.

Promptly after receiving such notice, plaintiffs consulted counsel, who prepared, filed and presented to me on Thursday, October 24, (1) a complaint, seeking declaratory and injunctive relief to prevent removal from the voters' registry the names of the ten plaintiffs who were registered, and to require the registration of the other two plaintiffs, and (2) a motion, supported by appropriate affidavits, for a temporary restraining order, a preliminary injunction and the convening of a three-judge court. Plaintiffs contend that the provision of the Maryland Constitution upon which defendants rely, as interpreted by the Maryland Court in *Royer*, violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

At the time the suit was filed the parties entered into a stipulation: (1) that the parties would cooperate to bring on for hearing promptly the motion for preliminary injunction; (2) that pending such hearing and determination by this court of said motion, defendants would take no steps to remove from the registry the names of nine of the ten registered plaintiffs;[1] and (3) that any party might move to modify the terms of the stipulation "to the same extent which such party would be entitled had the stipulation been in the form of a temporary restraining order issued after hearing".

On the same day oral notice of the application was given to Chief Judge Haynsworth of the Fourth Circuit,[2] and Judge Haynsworth designated Circuit Judge Winter and District Judge Harvey as the two other judges to serve on the three-judge court. Since Judge Winter will be engaged during the week of October 28 in hearing cases in Richmond, a hearing in this case was held on Friday, October 25, in the late afternoon. With commendable industry, counsel for defendants prepared and filed an answer, and the Deputy Attorney General of Maryland presented a reasoned argument at the hearing.[3] By agreement of the parties the case was submitted to the Court on the complaint, the answer and certain stipulations of fact.

The case presents a grave constitutional question, on which there appears to be a paucity of authority. The decision of the question will require careful consideration and will probably affect many persons, because of the number of federal reservations within the State of Maryland. Of necessity, the case was presented to the court with minimal opportunity for preparation by counsel or by the judges. Since the case was heard on complaint, answer and stipulations, a final judgment can be entered at

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[1] No reason for the omission of the tenth name from the stipulation was indicated at the hearing, and the court is advised that it was omitted by inadvertence.

[2] The oral notice was promptly supplemented by the customary written notice under 28 U.S.C. 2284.

[3] The notice to the Governor and the Attorney General of the State, required by 28 U.S.C. 2284(2), was acknowledged.

any time, but there will be no adequate opportunity before the election on November 5 for the study and conference which the importance of the case requires.

Therefore, the three judges believe that no final judgment should be entered at this time, but that I, to whom the application was made, should consider the issuance of a temporary restraining order.

Subsection 3 of 28 U.S.C. 2284 provides:

> "In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted."

It appears from the complaint, the answer and the stipulations that the plaintiffs will suffer irreparable damage, i.e., the denial of the right to vote in the election of November 5, 1968, if a temporary restraining order is not granted. But the ten plaintiffs who were already registered before October 19 are in a different status from the other two plaintiffs who were never registered. Since one of the recognized purposes of a temporary restraining order is to preserve the status quo, the temporary restraining order in this case will issue only as to the ten plaintiffs previously registered.

ORDER

Therefore, it is ORDERED by the United States District Court for the District of Maryland, this 28th day of October, 1968, at 4:00 p.m., that Rose K. Dawson and Marie M. Garber, Members of the Permanent Board of Registry for Montgomery County, Maryland, be and they are here-

by enjoined from removing the names of Tillye Cornman, Herbert Tabor, Celia White Tabor, Mary D. Pratt, Reynold R. Holliday, Elizabeth J. Holliday, Chris A. Hansen, Mary E. Hansen, Carlos Shultz and Frances Legallais from the voters' registry in Montgomery County until the further order of this court, or from denying them the right to vote at the election on November 5, 1968, and are hereby required to restore to the voters' registry the name of Frances Legallais if it has been removed. This order does not require defendants to register Edward Tabor and Elliot Vesell.

/s/ ROSZEL C. THOMSEN,

Chief Judge, U. S. District Court.

United States District Court for the District of Maryland

STIPULATION

The following facts are hereby stipulated to be true:

1. The boundaries of Precinct 8 of Election District 7 of Montgomery County were first established by resolution of the Supervisors of Montgomery County which resolution became effective on January 1, 1942. The tract of land comprising the grounds of the National Institutes of Health ("NIH") is wholly within said Precinct 8. Said precinct boundaries, which have not been altered since 1942, are more fully delimited as follows:

> Beginning for the same at a point in the center of the intersection of two highways known respectively as Wisconsin Avenue or the Rockville Pike and the Old Georgetown Road and running thence with the center line of said Wisconsin Avenue or the Rockville Pike to a point where the said center line intersects the center line extended of a public road known both as Browns Lane and Cedar Lane, thence with the center line of the said Browns Lane or Cedar Lane to the intersection of said center line with the center line of

the Old Georgetown Road and Alta Vista thence with the center line of the said Old Georgetown Road in a southerly or south easterly direction to the place of beginning.

2. Residents of NIH are counted as residents of Maryland under the decennial census and Maryland's apportionment of seats in the United States House of Representatives is based on a population figure which includes such residents.

3. Plaintiff Tillye Cornman has lived in Maryland since December 1954, and has resided on the grounds of NIH since that same time. Dr. Cornman is a member of the Cedar Lane Unitarian Church of Bethesda. She has been a registered voter in Maryland since September 21, 1956.

4. Plaintiffs Chris A. and Mary E. Hansen have lived in Maryland since 1956 and have resided on the grounds of NIH since 1965. They have participated in the following local organizations: Mrs. Hansen has been a member of the Red Cross chapter; the Girl Scouts; and the Montgomery County PTA; Mr. Hansen is a member of the Maryland Society for Professional Engineers. They have been registered voters since April 18, 1958. They have one child who attended public school in Montgomery County, as a resident of Montgomery County.

5. Plaintiffs Reynold R. and Elizabeth J. Holliday have lived in Maryland since 1951 and have resided on the grounds of NIH since 1953. She was an active member of the St. Luke's Episcopal Church until 1963; both Hollidays now belong to the Bethesda Chevy Chase Y-Club. She has been a registered voter since March 12, 1956, and Mr. Holliday has been a registered voter since September 16, 1960. They have four children in public schools, since 1956 through the present time, who attended school as residents of Montgomery County.

6. Plaintiff Frances Legallais has lived in Maryland since 1942 and on the grounds of NIH since 1954. She has been a registered voter since October 22, 1947.

7. Plaintiff Mary D. Pratt has lived in Maryland since 1948 and has resided on the grounds of NIH since 1951. Some of her local activities include the following: active in elementary school PTAs, where she has held offices; Girl Scouts; the Bethesda YMCA. In 1954, Mrs. Pratt was Chairman of the Chevy Chase Area National Symphony Fund Drive. She is also a member of St. Luke's Episcopal Church. She has been a registered voter in Maryland since September 20, 1952. She has three children in public schools, since 1953 to the present time, who attended school as residents of Montgomery County.

8. Plaintiff Carlos Shultz has lived in Maryland since 1953 and has resided on the grounds of NIH since 1958. He is a member of the Bethesda Presbyterian Church. He has been a registered voter in Maryland since February 27, 1956.

9. Plaintiffs Herbert and Celia W. Tabor have lived in Maryland since 1948, and have resided on the grounds of NIH since 1949. Prior to moving to the grounds of NIH, the Tabors resided at 4818 Chevy Chase Drive, also in Montgomery County, Maryland. They have participated in Montgomery County PTAs for over 15 years, as well as having been active in Cub Scout work. They have belonged to the Wildwood Manor Swimming Association for the past 8 years. Both are members of the Temple Shalom, and past members of the Beth El Congregation. Mrs. Tabor has been a Montgomery County School Health Assistant, and is also licensed to practice medicine in the State of Maryland, said license having been granted while she was residing on the grounds of NIH. They contribute regularly to the Youth Orchestra. The Tabors have been registered voters in Maryland since October 5, 1960.

10. Plaintiff Edward Tabor has lived in Maryland since 1948 and has resided on the grounds of NIH since 1949. He has been a volunteer worker in Montgomery County elections, and has spent his summers teaching athletics. He attempted to register to vote in 1968, but was refused on the sole ground that his residence on the NIH reserve did not constitute residence in Maryland.

11. Plaintiff Elliot Vesell has lived in Maryland since 1963 and has resided on the grounds of NIH since 1963. He attempted to register to vote in 1968, but was refused on the sole ground that his residenc on the NIH reserve did not constitute residence in Maryland.

(Signatures of counsel.)

United States District Court for the District of Maryland

STIPULATION

During the course of oral argument on January 2, 1969, the Court requested further information concerning the tax burden borne by real property in Montgomery County, Maryland. With respect thereto, the parties hereby stipulate as follows:

1. The Operating Budget of the Montgomery County Board of Education for the Fiscal Year, July 1, 1968 — June 30, 1969, total $110,549,170. $72.663,019 of the total budget is to be contributed by Montgomery County, while the remainder is to be contributed by the State of Maryland, the Federal Government, or to be derived from special charges. Of Montgomery County's total contribution, $61,857,019, or 55.95% of the total operating budget, was to be derived from the ad valorem (real property) tax. According to County Manager, Mason Butcher, actual receipts from the ad valorem tax are expected to be less than budgeted and actual receipts from the income tax are expected to be more than budgeted. Mr. Butcher now estimates that the ad valorem tax will equal about 50% of the total school operating budget.

2. The Operating Budget of the Montgomery County Council for the Fiscal Year July 1, 1968 — June 30, 1969, anticipates receipts of $37,885,886. $4,446,000 of the total budget is derived from the ad valorem tax while the remainder is to be derived from other taxes, license and per-

mit fees, intergovernmental revenues, charges for services, fines and forfeitures, and miscellaneous revenues. The ad valorem tax contribution therefore constitutes 11.74% of the total county operating budget.

3. The County and Board of Education debt service totals $15,957,815 for the current fiscal year. Almost all of this total is funded by the ad valorem taxes.

(Signatures of counsel.)

United States District Court for the District of Maryland

OPINION

Harvey, District Judge:

In this action brought under the Civil Rights Act,[1] plaintiffs challenge a provision of the Maryland Constitution which they claim has denied them the right to vote. Pursuant to 28 U.S.C. §2281, a three-judge court has properly been convened, and the case has been heard on the pleadings and stipulations of the parties.

All twelve plaintiffs reside on the grounds of the National Institute of Health, a federal reservation located within the geographical boundaries of Montgomery County, Maryland. Ten of the twelve had been registered voters within the State of Maryland for many years until October 19, 1968 when they were advised by the defendants, who are members of the Permanent Board of Registry of Montgomery County, that their names would be removed from the County voters' registry because as residents of federal property they did not qualify for voting in Maryland under the State Constitution. Two of the plaintiffs attempted to register to vote in the general election to be held on November 5, 1968 but were not permitted to do so for the same reasons.

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[1] 28 U.S.C. §1343 and 42 U.S.C. §1983.

Plaintiffs thereupon filed this action seeking a declaratory judgment and injunctive relief which would prevent the removal from the voters' registry of the names of ten of the plaintiffs and which would require the registration of the other two plaintiffs. Plaintiffs also filed a motion together with affidavits seeking a temporary restraining order and a preliminary injunction. On October 25, 1968, which was one day after the complaint and motion were filed, a hearing was held before this Court. In view of the very short time for preparation on both sides, the Court did not attempt to render a decision on the merits of the case following that hearing. However, pursuant to 28 U.S.C. §2284(3), Chief Judge Thomsen entered an order on October 28, 1968 enjoining the defendants until further order of this Court from removing the names from the voters' registry of the ten plaintiffs who had previously been registered.[2] Such order did not require the defendants to register the other two plaintiffs. Following the submission of briefs, another hearing before the Court was held on January 2, 1969 at which time the case was fully argued on the merits. Additional stipulations have likewise been filed.

The provision of the Maryland Constitution under attack is Article I, §1, which gives the right to vote to every citizen of the United States of the age of 21 years or more "who has been a resident of the state for one year, and of * * * the county, in which he may offer to vote, for six months next preceding the election, * * *". In *Royer v.*

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[2] In the memorandum opinion accompanying his order, Judge Thomsen said the following:

> "The case presents a grave constitutional question, on which there appears to be a paucity of authority. The decision of the question will require careful consideration and will probably affect many persons, because of the number of federal reservations within the State of Maryland. Of necessity, the case was presented to the court with minimal opportunity for preparation by counsel or by the judges. Since the case was heard on complaint, answer and stipulations, a final judgment can be entered at any time, but there will be no adequate opportunity before the election on November 5 for the study and conference which the importance of the case requires."

Board of Election Supervisors, 231 Md. 561 (1963), cert. den. 375 U.S. 921 (1963), the Court of Appeals of Maryland held that residents of a federal enclave located within the State of Maryland are not residents of the State for the purposes of voting. Plaintiffs claim that as so construed, §1 of Article I of the Maryland Constitution denies them the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. For the reasons hereafter stated, we agree.

Under Article I, section 8, clause 17 of the United States Constitution, Congress is empowered to "exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;". Ever since *Opinion of the Justices*, 42 Mass. 580 (1840), and *Sinks v. Reese*, 19 Ohio St. 306 (1869), it has been held in most of the cases considering the question that where the federal government has exclusive jurisdiction of an enclave, persons residing in such enclave are not state residents for voting purposes.[8] The rationale for these decisions was stated by the Court in *Sinks v. Reese* as follows, at page 316:

> "By becoming a resident [of the federal enclave], a person though up to that time he may have been a citizen and resident of Ohio, ceases to be such; he is relieved from any obligation to contribute to their revenues, and is subject to none of the burdens which she imposes upon her citizens. He becomes subject to the exclusive jurisdiction of another power, as foreign to Ohio as is the states of Indiana or Kentucky, or the District of Columbia."

In the earlier cases, there was little doubt that the United States had exclusive jurisdiction over the enclave

[8] In the *Royer* case, the Maryland Court of Appeals followed *Lowe v. Lowe*, 150 Md. 592 (1926), which held that a resident of a federal enclave in Cecil County had not acquired a State residence for the purpose of filing a divorce suit. Other state cases reaching the same result as to voting rights are collected in 34 A.L.R. 2d 1193-1202 (1954).

in question. However, the issue is presented in a somewhat different light in the pending case as a result of the enactment by Congress of various statutes which have effected a retrocession to Maryland and other states of portions of the federal government's exclusive jurisdiction over federal enclaves and the exercise by Maryland of the powers which Congress has returned to the State.

Where the federal government has exclusive jurisdiction over land located within the geographical boundaries of a state, it can hardly be doubted that no constitutional right of a resident of the enclave is infringed by the state's refusal to grant such resident the right to vote. But it would be equally clear that if there were a retrocession by the federal government to a state of all or substantially all incidents of jurisdiction, such state could not constitutionally deny residents of the enclave the right to vote.[4] The facts of the present case lie somewhere in between these readily demonstrable extremes. The question here is whether Maryland has undertaken to impose on residents of this federal enclave obligations and duties of state citizenship to such a degree that it would amount to unconstitutional discrimination if the right to vote were not likewise granted. Determination of this question requires a balancing of the incidents of jurisdiction still retained by the federal government against those exercised by the State of Maryland as well as consideration of the nature of the right that plaintiffs claim has been denied to them.

Exclusive jurisdiction to lands acquired by the United States for general purposes was ceded by the State of

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[4] See *Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States*, Part II (June 1957), pages 221-222. This Committee was formed in 1954 with the approval of President Eisenhower to study the problems arising out of the jurisdictional status of federally owned areas within the several states, which the Department of Justice had found to be "in a confused and chaotic state." Part I, page 2. The Committee noted that there were four categories of legislative jurisdiction over such areas: exclusive jurisdiction, concurrent jurisdiction, partial jurisdiction and proprietorial interest only. A discussion of these four categories may be found at pages 15-22 of Part I of the Report.

Maryland to the federal government by virtue of Chapter 743 of the Acts of 1906, now codified as §§31, 36 and 37 of Article 96 of the Annotated Code of Maryland (1964 Repl. Vol.). Specific consent was given for the acquisition of the grounds of the National Institute of Health in Montgomery County by §34 of Article 96. Both §34 and §36 provide that the State shall retain the right to serve on the federal lands civil and criminal process of the courts of the State.[5]

The first of a series of enactments returning to the states portions of the federal government's exclusive jurisdiction over enclaves was passed by Congress in 1928. In that year, a statute was enacted which provided that in the case of the wrongful death of any person on a federal enclave, the same right of action would exist as though the place were under the jurisdiction of the state within whose exterior boundaries the place was. 16 U.S.C. §457. In 1936, Congress authorized the states to extend to such areas their workmen's compensation laws. 40 U.S.C. §290. In that same year, the Lea Act was passed which permitted the levying of gasoline and other motor vehicle fuel taxes upon fuels sold in federal enclaves. 4 U.S.C. §104.

In 1939, jurisdiction was returned to the states to enforce their unemployment insurance laws within the borders of federal lands. 26 U.S.C. §3305(d). The most extensive and far reaching retrocession statute enacted by Congress was the Buck Act in 1940. 4 U.S.C. §§105-110. That enactment gave the states "full jurisdiction and power" to levy and collect sales, use and income taxes within federal enclaves. A 1947 enactment permitted the states to tax a lessee's interest in real estate leased by the federal government from within an enclave. 10 U.S.C. §2667(e).

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[5] The reservation of this right has been seen as an act of comity and not inconsistent with the exclusive jurisdiction of the federal government. *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 534 (1885).

Under the Assimilative Crimes Act, 18 U.S.C. §13,[6] the criminal laws of the states are applicable to federal enclaves, if the act or omission is not punishable by a Congressional statute. A 1948 amendment of this Act provides that the state law in force at the time of the act or omission governs if there is no pertinent federal law, eliminating the previous requirement of periodic re-enactments of the Act to keep abreast of changes in state penal laws. In 1950, Congress provided for payments by the federal government to local schools for the children of residents of federal reservations attending such schools. 20 U.S.C. §236 et seq.[7]

The Maryland Legislature, although not granting residents of federal enclaves within the State the right to vote, has conferred other benefits of State citizenship on such individuals. Following the decision of the Court of Appeals in *Lowe v. Lowe, supra,* the Legislature in 1927 permitted residents of federal enclaves to use the State courts for divorce matters. §23 of Article 16, Annotated Code of Maryland (1957 Ed.). Later it opened the State courts to such residents for adoption proceedings. §69, Article 16. Children of such residents are permitted to attend school in the counties in which are located the reservations where they live.

This cataloguing of State and federal enactments indicates that the concept of exclusive federal jurisdiction over reservations such as the one here involved has been drastically altered within the past 40 years. The plaintiffs here may be prosecuted under State criminal statutes, are subject to State unemployment and workmen's compensation laws, and have access to the State courts under acts permitting divorce and adoption proceedings. However,

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[6] The first Assimilative Crimes Act was enacted in 1825 and has been amended on several occasions since then. See *Report of the Interdepartmental Committee,* Part II, pages 126-131.

[7] It should further be noted that plaintiffs are counted as residents of Maryland under the decennial census. Therefore, Maryland's apportionment of seats in the United States House of Representatives is based on a population figure which includes them.

they have no voice in the selection of legislators who may amend these statutes or enact new ones which will affect their rights as to these matters. The children of these plaintiffs attend local schools in Montgomery County. Yet their parents have no voice in the selection of members of the school board. Income, sales and gasoline taxes are undeniably major sources of revenue for the State of Maryland. Although the plaintiffs here are compelled to pay such taxes, they may not participate in the election of the legislators responsible for the enactment of tax statutes within the State.

The rationale of the earlier decisions denying the right to vote to a resident of a federal enclave has been undercut by the various retrocessions by Congress of its otherwise exclusive jurisdiction. No longer is it true, as stated in *Sinks v. Reese, supra,* 19 Ohio St. at 401, that such a resident "is relieved from any obligation to contribute to [a state's] revenues and is subject to none of the burdens which she imposes upon her citizens." Nor is there validity today to the statements made by the Maryland Court of Appeals in 1926 in *Lowe v. Lowe, supra,* that such residents "are not residents of the State of Maryland * * * for taxation purposes" and that "the federal government has complete and exclusive jurisdiction and power of legislation" over a federal reservation within the State. 150 Md. at pages 600-601.

The theory of the extraterritoriality of a federal enclave was impliedly rejected by the Supreme Court in *Howard v. Commissioners of Louisville,* 344 U.S. 624 (1953). In that case, the issue was whether the City of Louisville could lawfully annex a federal enclave on which was located a Naval Ordnance Plant. The trial court had concluded that since the federal government had exclusive jurisdiction over the reservation, it was no longer a part of the State of Kentucky, subject to annexation. The Court of Appeals of Kentucky reversed. *Commissioners of Sinking Fund v. Howard,* 248 S.W. 2d 340 (Ky. 1952). In affirming that decision, the United States Supreme Court said the following (344 U.S. at 626-627):

> "A state may conform its municipal structures to its own plan, so long as the state does not interfere with

the exercise of jurisdiction within the federal area by the United States. Kentucky's consent to this acquisition gave the United States power to exercise exclusive jurisdiction within the area. A change of municipal boundaries did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property. *The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government.* The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aims. It is friction, not fiction to which we must give heed." (Emphasis added).

The State of Maryland here argues that since substantial portions of the federal government's exclusive jurisdiction over this land is still retained by the United States, the State is constitutionally justified in declining to permit plaintiffs to vote. In particular, it is noted that the plaintiffs pay no property taxes,[8] that they are exempt from personal service as a part of the State's unorganized militia, that their children are not subject to State compulsory education laws and that they are exempt from State jury service. That the federal government still retains wide authority over this federal enclave does not answer the question before the Court, for it is likewise clear that in the aggregate the jurisdiction over plaintiffs that has been returned to Maryland is extensive. We are not concerned here with Maryland's refusal to grant to residents of a federal enclave ordinary rights and privileges given to other citizens of the State. The question before the Court is whether the State can constitutionally withhold from these plaintiffs a right as vital as the right to vote.

Exercise of the elective franchise has always been considered one of the most basic of those rights enjoyed by a

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[8] Property taxes account for about 50% of the operating budget of the Montgomery County Board of Education and about 12% of the operating budget of the County itself.

citizen of a free democratic society. In *Carrington v. Rash*, 380 U.S. 89 (1965), the Supreme Court had before it a challenge to a provision of the Texas Constitution which prohibited from voting in State elections any member of the armed forces moving to Texas during his tour of duty. In finding that such a prohibition was an invidious discrimination in violation of the Fourteenth Amendment, the Court said the following at page 96:

> "We deal here with matters close to the core of our constituitonal system. 'The right . . . to choose,' *United States v. Classic*, 313 U.S. 299, 314, that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State. *Oyama v. California*, 332 U.S. 633."

In the more recent case of *Williams v. Rhodes*, 393 U.S. 23, (decided October 15, 1968), the Court reaffirmed its statement in *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), in which it said the following with reference to the right to vote (at page 31):

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined,".

We conclude that on balance the plaintiffs here are treated by the State of Maryland as state residents to such an extent that it is a violation of the Fourteenth Amendment for the State to deny them the right to vote. A state may not subject an individual who resides within its geographical boundaries to substantial obligations of citizenship and at the same time deny such individual the correlative right to exercise a voice in defining the nature and extent of such obligations. It is no answer to say that there are many rights and obligations of citizens of Maryland which are not enjoyed by or have not been assumed by these plaintiffs. Without determining which way the scales would tip with respect to other rights, we are of the opinion that the incidents of jurisdiction exercised by

Maryland over these plaintiffs are sufficiently weighty that the important right claimed here cannot be constitutionally denied.

Similar reasoning was employed by the Court in *Arapajolu v. McMenamin*, 113 Cal. App. 2d 824, 249 P. 2d 318, 34 A.L.R. 2d 1185 (1952),[9] a decision of the California District Court of Appeal, review of which was denied by the Supreme Court of California. In finding that a resident of a federal enclave located within the State of California was a resident of the state entitled to vote, the court said the following (34 A.L.R. 2d at 1191-1192):

> "The jurisdiction over these lands is no longer full or complete or exclusive. A substantial portion of such jurisdiction now resides in the States and such territory can no longer be said with any support in logic to be foreign to California or outside of California or without the jurisdiction of California or within the exclusive jurisdiction of the United States. It is our conclusion that since the State of California now has jurisdiction over the areas in question in the substantial particulars above noted residence in such areas is residence within the State of California entitling such residents to the right to vote given by sec. 1, Art. II of our Constitution."

For the reasons stated, plaintiffs are entitled to the relief that they are seeking. Counsel should prepare and submit within ten days an appropriate order.

/s/ HARRISON L. WINTER,
United States Circuit Judge,

/s/ ROSZEL C. THOMSEN,
Chief Judge,
United States District Court,

/s/ ALEXANDER HARVEY, II,
United States District Judge.

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[9] Two other state courts have likewise held residents of a federal enclave to be residents of the state for voting purposes. *Adams v. Landree*, 139 W. Va. 748, 83 S.E. 2d 127 (1954) and *Rothfels v. Southworth*, 11 Utah 2d 169, 356 P. 2d 612 (1960).

United States District Court for the District of Maryland

ORDER

In accordance with the opinion of the United States District Court for the District of Maryland, dated 29th January 1969:

It is hereby ORDERED by the United States District Court for the District of Maryland, this 19th day of February, 1969 that Rose K. Dawson and Marie M. Garber, Members of the Permanent Board of Registry for Montgomery County, Maryland, be and they hereby are permanently enjoined from removing the names of Tillye Cornman, Herbert Tabor, Celia White Tabor, Mary D. Pratt, Reynold R. Holliday, Elizabeth J. Holliday, Chris A. Hansen, Mary E. Hansen, Carlos Schultz and Frances Legallais from the voters' registry in Montgomery County as long as such removal is based on the contention that their residence on the NIH enclave does not constitute residence in the State of Maryland; and Rose K. Dawson and Marie M. Garber are further ordered to cease and desist from refusing to place on said voters' registry the names of Edward Tabor and Elliott Vesell on the ground that their residence on the NIH enclave does not constitute residence in the State of Maryland.

/s/ HARRISON L. WINTER,
United States Circuit Judge,

/s/ ROSZEL C. THOMSEN,
Chief Judge
United States District Court,

/s/ ALEXANDER HARVEY, II,
United States District Judge.

United States District Court for the District of Maryland

ORDER

Upon the Motion To Intervene filed by Francis B. Burch, Attorney General of Maryland, and William Evans, Marshall W. Jones, Jr. and Betty M. Silbert, members of the Board of Supervisors of Elections of Baltimore City on March 17, 1969; and no objection having been filed thereto; and after consultation and approval of this Order by all three of the Judges sitting in this case, it is

ORDERED this 10th day of April, 1969, that leave be granted the said Francis B. Burch, Attorney General of Maryland, and the said William Evans, Marshall W. Jones, Jr. and Betty M. Silbert, members of the Board of Supervisors of Elections of Baltimore City, to intervene as parties defendant in this action and to file the Answer annexed to the Motion To Intervene.

/s/ ALEXANDER HARVEY, II,
United States District Judge.

United States District Court for the District of Maryland

ANSWER

Wm. Evans, Marshall W. Jones, Jr. and Betty M. Silbert, constituting the Board of Supervisors of Elections of Baltimore City and Francis B. Burch, Attorney General of Maryland, intervening defendant, answering the Complaint heretofore filed in this cause, states that:

1. They admit the jurisdiction of this Court as alleged in Paragraph 1 of said Complaint.

2. They admit that the plaintiffs are citizens of the United States and deny that they are citizens or residents of the State of Maryland or that they satisfy the qualifica-

tions for registration and voting under the Election Laws of State of Maryland.

3. They admit those portions of Paragraph 3 of the Complaint alleging that the plaintiffs occupy living quarters located on the grounds of the National Institutes of Health. They deny the allegation that the Federal Government does not exercise or enjoy exclusive jurisdiction over plaintiffs' residence and assert that plaintiffs are residents of a federal reservation under the exclusive jurisdiction of the Federal Government. They admit that plaintiffs are required to pay state income, and sales and use taxes and motor vehicle registration and license fees and refer to the provisions of the Buck Act as to the extent of plaintiffs' liability for motor fuel taxes. They deny that plaintiffs are subject to the jurisdiction of the State or local courts to the same extent as other residents of the State or County and deny that ordinances of the State or County are applicable to them in all material respects substantially to the same extent as to other residents of the State or County.

4. They admit the allegations of Paragraph 4 of the Complaint.

5. They deny that any of the plaintiffs have complied with all the Election Laws of Maryland or are qualified to vote in Maryland, but admit that the names of some of them appear on the registry and that others have applied for registration.

6. They admit the allegations of Paragraph 6 of said Complaint.

7. They deny the allegations of Paragraph 7 of the Complaint.

8. They admit the allegations of Paragraph 8 of the Complaint.

9. They deny the allegations of Paragraph 9 of the Complaint.

Wherefore, having fully answered the said Complaint, the defendants pray that the same may be dismissed with costs to the plaintiffs.

(Signatures of counsel and certificate of service.)

SUPREME COURT, U. S.

FILED

JUN 13 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 236

WILLIAM EVANS, MEMBER OF THE BOARD OF SUPERVISORS OF ELECTIONS OF BALTIMORE CITY, ET AL.,

Appellants,

v.

TILLYE CORNMAN, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ------

WILLIAM EVANS, MEMBER OF THE BOARD OF SUPERVISORS OF ELECTIONS OF BALTIMORE CITY, ET AL.,

Appellants,

v.

TILLYE CORNMAN, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The initial opinion of the United States District Court for the District of Maryland in support of its order of October 28, 1968, preserving the status quo is reprinted at App. 1a; the opinion of the District Court granting permanent relief is reprinted at App. 4a. The initial and final opinions, the initial and final decrees, and the order

granting intervention are reprinted herewith as Appendix "A"; the opinions are not as yet officially reported.

JURISDICTION

This suit was brought under 28 U.S.C.A., §§1343, 1357, 2201, and 2202 and 42 U.S.C.A., §§1983 and 1988 to restrain orders of the Permanent Board of Registry for Montgomery County, Maryland, refusing to register two of the plaintiffs on the voting registry of the State and removing the other plaintiffs (who had, by inadvertence, been permitted to register) from the voting registry. The complaint, which prayed the convening of a three-judge District Court, sought to enjoin, and the final decree enjoined, the application to the plaintiffs of the provisions of Article I, Section 1 of the Maryland Constitution, which, as authoritatively construed by the Maryland Court of Appeals, provides that residents of reservations under the exclusive territorial jurisdiction of the federal government are ineligible for the state franchise. The final decree of the three-judge District Court enjoining enforcement of the state constitutional provisions as to the plaintiffs was entered on February 19, 1969. An order permitting the Attorney General of Maryland and the Board of Supervisors of Elections of Baltimore City to intervene as parties defendant was entered on April 10, 1969 pursuant to Motion filed on March 17, 1969, no objection thereto having been filed by plaintiffs and entry of the order having been consented to by the defendant members of the Permanent Board of Registry for Montgomery County. Notice of Appeal was filed in the District Court on April 14, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C.A., §1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Alabama Pub.*

Serv. Comm. v. Southern Ry. Co., 341 U.S. 343-44 n. 3; *Davis v. Mabry*, 380 U.S. 251; *McDonald v. Bd. of Election Commrs. of Chicago*, 22 L.Ed. 2d 739.

QUESTIONS PRESENTED

1. Does the decree of the District Court permitting and directing the extension of the state franchise and participation in state political controversy to reservations under the exclusive territorial jurisdiction of the Federal Government contravene Article I, Section 8, Clause 17 of the Constitution of the United States in the absence of consent by the Congress of the United States to such state political involvement?

2. Was the District Court correct in concluding that the Fourteenth Amendment to the Constitution of the United States, limiting state action, operated in derogation of Article I, Clause 8, Section 17 so as to empower and require the State to enfranchise residents of areas under the exclusive territorial jurisdiction of the National Government?

3. Was the District Court correct in concluding that the Equal Protection Clause required that the Plaintiffs be placed on the same footing with State residents with respect to state elections even though they remain immune from many of the burdens and responsibilities of State citizenship and hence will be preferentially empowered, through the state franchise, to impose burdens upon state residents to which they themselves cannot be required by the State to submit?

STATUTES INVOLVED

Article I, Section 1 of the Constitution of Maryland, declared unconstitutional by the District Court as applied to the named plaintiffs, reads, in pertinent part, as follows:

> "All elections shall be by ballot; and every citizen of the United States, of the age of twenty-one years,

or upwards, who has been a resident of the State for one year, and of the Legislative District of Baltimore city, or of the county, in which he may offer to vote, for six months next preceding the election, shall be entitled to vote, in the ward or election district, in which he resides, at all elections hereafter to be held in this State . . ."

Article 96, §34 of the Code of Public General Laws of Maryland, enacted by Chapter 158 of the Acts of 1953, provides, with respect to the site of plaintiffs' residence, that:

"(a) *Consent to acquisition*

The consent of the State of Maryland is hereby given in accordance with Article I, §8, clause 17 of the Constitution of the United States to the acquisition by the United States for public health purposes of the following described tract of land lying within Montgomery County:

[metes and bounds omitted]

Comprising approximately 317.7 acres as shown on plot of survey, site 1-28, 'National Institutes of Health — Montgomery County, Maryland' prepared by Maddox and Hopkins, Civil Engineers, Silver Spring, Maryland, dated January, 1948, revised May 27, 1948.

"(b) *Jurisdiction*—Exclusive jurisdiction over the parcel of land described in subsection (a) of this section shall be and the same is hereby ceded to the United States for all purposes except that the State retains the right to serve thereon all civil and criminal process of the courts of this State,[1] but the jurisdiction so

[1] It has long been clear that such a limited reservation by the State does not defeat exclusive federal jurisdiction. Art. I, Sec. 8, Cl. 17 itself makes this clear, as do federal statutes. "A cession by a State of jurisdiction . . . shall be deemed sufficient . . . notwithstanding it contains a reservation that process issued under authority of such State may continue to be served within such place." 1 Stat. 426 (1795), 33 U.S.C.A., §728, see *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 at 533-34; *United States v. Cornell*, Fed. Case No. 14,867 (D.R.I. 1819) (Story, J.).

ceded shall not vest as to all or any portion of the said parcel of land unless and until the United States shall own it, and the jurisdiction shall continue no longer than the United States shall own such land."

STATEMENT

The present case involves the validity of Article I, Section 1 of the Constitution of Maryland, limiting the right to vote in state and local elections to "citizen[s] of the United States . . . who [have] been resident[s] of the State for one year, and of . . . the county . . . for six months next preceding the election . . .". The constitutionality of the one-year residence period provided by the State Constitution was upheld by this Court in *Drueding v. Devlin*, 380 U.S. 125, affirming 234 F. Supp. 721 (D. Md. 1964); the constitutionality of disqualifications of nonresidents and of resident aliens, who of course are fully liable for state taxes and personal exactions, has long been well established in decisions of this Court: "[i]n *W.M.C.A. v. Lomenzo*, 377 U.S. 633 . . . we treated an apportionment based upon United States citizen population as presenting problems no different from apportionments using a total population measure. Neither in *Reynolds v. Sims*[2] nor in any other decision has this Court suggested that the states are required to include aliens, transients, short-term or temporary residents or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. . . . The difference between exclusion of all military and military-related personnel, and exclusion of those not

[2] 377 U.S. 533.

meeting a state's residence requirements is a difference between an arbitrary and a constitutionally permissible classification." *Burns v. Richardson*, 384 U.S. at 91-92 and n. 21.

The present case involves the application of the Maryland constitutional provision to twelve plaintiffs, all residents on the grounds of the National Institutes of Health. The area on which plaintiffs reside was ceded to the United States in 1953 by Article 96, Section 34 of the Code of Public General Laws of Maryland, Chapter 158 of the Acts of 1953, and was accepted by the United States, the State reserving only the right to serve its civil and criminal process on the reservation. While some of the plaintiffs had previously resided and voted in Maryland outside the federal reservation, none of them claimed an intention to retain his previous residence as a basis for allowance to him of the franchise.[3] None of the affidavits of plaintiffs contained any facts from which retention of a domicile outside the federal reservation could be found.

Ten of the twelve plaintiffs were on or about October 18, 1968 removed from the voting rolls upon discovery of the fact that they resided outside the State's jurisdiction; two of the plaintiffs were refused registration on the same ground, since it has long been established that residents of reservations under the exclusive jurisdiction of the federal government are not residents of Maryland. *Lowe v. Lowe*, 150 Md. 592, 133 A. 729 (1926); *Royer v. Board of Election Supervisors*, 231 Md. 561, 191 A. 2d 446 (1963), cert. denied 375 U.S. 921; *Tanner v. McKeldin*, No. 17,373 Eq. (Cir. Ct.

[3] The circumstances in which a Maryland resident moving on to a federal reservation may be deemed to have intended to retain his prior residence are outlined in *Walsh v. Crouse*, 232 Md. 386, 194 A. 2d 107 (1963), making clear that persons residing on federal reservations by legal compulsion do not forfeit their rights at their prior place of residence.

Frederick Co. 1953); 10 Opinions of the Attorney General of Maryland, 107 (1925); 11 Id. 120 (1926); 17 Id. 139 (1932); 36 Id. 129 (1951); 46 Id. 114 (1961); 47 Id. 103 (1962).

On October 24, 1968, plaintiffs instituted the present action, praying declaratory and injunctive relief against removal or exclusion from the voting rolls of the named plaintiffs and praying the convening of a three-judge court and the issuance of a temporary restraining order. Pursuant to 28 U.S.C.A., §2284 (a), the Attorney General of Maryland was advised of the filing of the action, and at the request of counsel for the Permanent Board of Registry for Montgomery County conducted the defense of this action. On October 25, 1968, a hearing was conducted by the three-judge court. On October 28, 1968, Chief Judge Thomsen, the District Judge to whom the application for three-judge court and temporary restraining order had been presented, issued, pursuant to 28 U.S.C.A., §2284 (3), a temporary restraining order preserving the status quo by granting temporary relief to the ten plaintiffs who had been inadvertently registered but not to the two who had unsuccessfully sought registration, the Court noting the imminence of the national election on November 5, 1968. The accompanying opinion found, notwithstanding the directly applicable *Royer* case in which this court had denied certiorari only five years earlier, a "paucity of authority" on the point at issue (App. 2a).

On January 29, 1969, the three-judge court, following further argument, rendered an opinion expressing the view that Art. I, Section 1 of the Maryland Constitution, as construed in *Royer v. Board of Election Supervisors, supra*, was invalid as applied to the plaintiffs. The opinion, which discussed none of this court's prior holdings relating to the

legal status of federal reservations, relied entirely on "implication" (App. 10a) from a dictum in *Howard v. City of Louisville*, 344 U.S. 624 and on the holding in *Carrington v. Rash*, 380 U.S. 89, a case not involving federal enclaves at all, in reaching a result which the court conceded was unsupported by and contrary to the directly applicable decisions (App. 6a). On February 19, 1969, the court signed an order in the form submitted by plaintiffs granting them the relief prayed. The defendants' prayer that entry of the order be stayed for a period of sixty days to permit the filing of a Notice of Appeal to this court and be stayed thereafter pending decision by this Court was refused, the Court explaining that "[w]e agreed upon [plaintiffs'] form of order so that the plaintiffs would not be prevented from voting this fall if there is a special election" (App. 14a). At the time, some nine months prior to November, 1969, no special election had been called; the validity of a special election called by the Maryland General Assembly by Chapter 76 of the Acts of 1969, approved April 9, 1969, is presently the subject of litigation in the state courts.

On March 17, 1969, the Attorney General of Maryland and the Members of the Board of Supervisors of Elections of Baltimore City filed a Motion to Intervene as parties defendant in this action pursuant to Rules 24 (a) (2) and 24 (b) (1) and (2) of the Federal Rules of Civil Procedure.[4] On April 10, 1969, the Permanent Board of Registry of Montgomery County having consented to intervention and no objection thereto having been filed by plaintiffs, an order was signed by the court granting the requested inter-

[4] By statute, Md. Code Ann. Art. 32A, Sec. 2 (1957), the Attorney General of Maryland is counsel to the Board of Supervisors of Elections of Baltimore City, and the Secretary of State of Maryland. He is not counsel, however, to the Permanent Board of Registry of Montgomery County, or to the Board of Supervisors of Elections of Montgomery County.

vention.[5] On April 14, 1969, the intervenors noted the present appeal.

THE QUESTIONS ARE SUBSTANTIAL

1. As a result of the unprecedented decision appealed from, a serious conflict of authority exists, in Maryland and elsewhere, as to the voting rights of residents of reservations under the exclusive jurisdiction of the federal government. The views of the United States District Court for the District of Maryland as expressed in the present case are diametrically opposed to those of the Court of Appeals of Maryland, as expressed in *Royer v. Board of Election Supervisors*, 231 Md. 561, 191 A. 2d 446 (1963), cert. denied 375 U.S. 921. They likewise are opposed to the clear expressions by this court on the subject (which the District Court did not discuss), see *Fort Leavenworth R. R. Co. v. Lowe*, 114 U.S. 525, 537, and *Surplus Trading Co. v. Cook*, 281 U.S. 647, 654-55. The continuing vitality of the views as to the juridical status of reservations under exclusive federal jurisdiction expressed in the *Fort Leavenworth* case was recognized in *Paul v. United States*, 371 U.S. 245, 263, and *Humble Oil and Refining Co. v. Waggoner*, 376 U.S. 369, 372, while the *Surplus Trading* case was cited approvingly in *Howard v. Commr. of Louisville*, 344 U.S. 624, 627, the very case on which the court below purported to rely. The court below recognized that directly pertinent authority is virtually unanimous in rejecting the result reached by the court below. See *Sinks v. Reese*, 19 Ohio St. 306, 316 (1869); *Commonwealth v. Clary*, 8 Mass. 72, 77 (1811); *Opinions of the Justices*, 42 Mass. 580 (1841); *United States v. Cornell*, Fed. Case No. 14,867 (D.R.I. 1819) (Story, J.); *Arledge v. Mabry*, 52 N.M. 303, 197 P. 2d 884

[5] The documents relating to intervention are set out as Appendix "B" hereto.

(1948); *Herken v. Glynn,* 151 Kan. 855, 101 P. 2d 946 (1940); *Royer v. Bd. of Elections, supra;* see generally 34 A.L.R. 2d 1193-1202 (1954).[6] This condition has continued to the date of filing of this jurisdictional statement. See *Langdon v. Jaromillo,* 37 U.S. L. W. 2653 (Sup. Ct. N.M. May 12, 1969).

2. The questions are of obvious general importance. See the *Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States,* (1956) Vol. I, pp. 123-26 as to the area and population of enclaves under exclusive federal jurisdiction, some of which dwarf in population the municipalities and local subdivisions within whose borders they are situated.

3. The court below plainly misinterpreted and misapplied the two Supreme Court cases upon which it relied. *Howard v. City of Louisville,* 344 U.S. 624, has never been subsequently cited by this Court. It moreover expressly reaffirmed the proposition of *Surplus Trading Co. v. Cook* that "exclusive jurisdiction . . . remains with the United States, except as modified by statute." (344 U.S. at 627). The *Howard* case held merely that a state legislature could alter the boundaries of subdivisions to include a federal reservation in an incorporated rather than unincorporated area for tax purposes since a federal statute, the Buck Act (4 U.S.C.A. §§105-10) allowed state subdivisions to impose certain taxes. The *Howard* case was merely a Buck Act case dealing with state exercise of powers expressly retro-

[6] The cases relied on by the court below as announcing a different rule, *Arapojolu v. McMenamin,* 113 Cal. App. 2d 824, 249 P. 2d 318 (1952); *Rothfels v. Southworth,* 11 Utah 2d 169, 356 P. 2d 612 (1960) and *Adams v. Londeree,* 139 W. Va. 748, 83 S.E. 2d 127 (1954) all involved construction of state statutes and did not rest on Federal constitutional grounds. All were decided by sharply divided courts. The latter two cases did not involve "constitutional" reservations such as that involved here since in both instances the state reserved concurrent jurisdiction at the time of cession.

ceded to it, as was made clear by the opinion of the Kentucky Court of Appeals in *Commissioner of Sinking Fund v. Howard*, ... Ky. ....., 248 S.W. 2d 340 (1952), affirmed by the Supreme Court. See *Mississippi River Fuel Corp. v. Cocreham*, 382 F. 2d 929, 937 n. 17 (5th Cir. 1967); *Burns v. State Bureau of Revenue*, 79 N.M. 53, 439 P. 2d 702, 703 (1968), cert. denied 393 U.S. 841, so construing the *Howard* case. It is similarly apparent that *Carrington v. Rash*, 380 U.S. 89, dealt with discrimination on grounds of employment, not nonresidence; both the *Carrington* opinion itself and *Burns v. Richardson*, 384 U.S. 73, 92 n. 21 make this clear.

4. The court below held that the state-imposed burdens to which the federal government, as a matter of policy, elected to subject plaintiffs rendered the denial of the franchise to them irrational and prohibited by the Equal Protection clause of the Fourteenth Amendment. The Equal Protection clause, which provides only that "[no] state . . . shall . . . deny to any person *within its jurisdiction* the equal protection of the laws" (emphasis added) (see *Blake v. McClung*, 172 U.S. 239, 260-61) is clearly inapplicable to the plaintiffs here, who are residents of an area expressly placed beyond the State's jurisdiction by Article I, Section 8, Clause 17 of the Constitution. The historic purpose of the "forts and dockyards" clause was to insulate vital Federal installations from interference as the result of domestic political turmoil within the states. See the account of the origins of that clause and the related clause having to do with the District of Columbia in *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 529-30 and see *The Federalist* No. 42 and 2 Story, *Commentaries on the Constitution*, Section 1219. It was recognized at the time of the state conventions at which the Constitution was ratified that one effect of it was to disenfranchise residents of "constitutional

reservations" such as the District of Columbia in the absence of reservations imposed by states in their acts of cession. See Interdepartmental Committee Report, *supra*, Vol. II, pp. 22-28 and debates therein cited. The "forts and dockyards" clause and the constitutional provisions relating to the District of Columbia have traditionally been read *in pari materia* by the federal courts. See *Paul v. United States*, 371 U.S. 245, 263 (1963) which observes "the power of Congress over federal enclaves that come within the scope of Article I, Section 8, Clause 17, is obviously the same as the power of Congress over the District of Columbia". The *Paul* case expressly reaffirms the principles of *Fort Leavenworth R.R. Co. v. Lowe*. See also *Albaugh v. Tawes*, 233 F. Supp. 576 (D. Md. 1964) affirmed 379 U.S. 27; *In Re Town of Highlands*, 22 N.Y.S. 137, 140 (Sup. Ct. 1892).

5. Even if the plaintiffs can claim the protection of the Equal Protection Clause, the classification made by the State is clearly rational as to them. While, by reason of the explicit partial retrocession of federal jurisdiction contained in the so-called "Buck Act" (4 U.S.C.A., §§101-110), the plaintiffs are subjected to state sales, income, and motor vehicle taxes, there are numerous other burdens of state citizenship to which they are not subjected. The Plaintiffs bear no part of the burden of state property taxes either directly through the ownership of taxable property or indirectly through the lease of property upon rentals predicated in part on property taxes. Even if they actually owned land within the area of federal exclusive jurisdiction, they would still be exempt. *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930); Interdepartmental Committee Report, Vol. II, p. 178. Plaintiffs are thus effectively exempt from the levy which supplies the lion's share of the revenues of local and county governments, including the

lion's share of school revenues. They are also exempt from the state property tax, which is levied for the purpose of servicing the State's bonded indebtedness pursuant to Article III, Section 34 of the Constitution of Maryland, and the various general construction loan laws and other bond bills. They are, thus, effectively exempt from bearing any part of the burden of the State's debt.

In addition, it seems altogether clear that Plaintiffs are exempt from the most basic obligation that can be imposed by any political authority: the obligation of personal service. Plaintiffs are not a part of the unorganized militia of the State referred to in Article 65, Section 5 of the Public General Laws and are not subjected to compulsory military service at the call of State authority. (That this obligation is not chimerical is suggested by the opinions of the Attorney General of Maryland to Governor Agnew dated June 3 and July 11, 1968, holding, with the occurrence of the Federal authorities, that individual members of the Army and Air Force Reserves are subject to call by the State Government as members of the unorganized militia in the event of civil emergency). It is clear that Plaintiffs are exempt from this obligation of compulsory personal service. See 16 Opinions of the Attorney General of the United States 469 (1880); *Pundt v. Pendleton*, 167 Fed. 997 (N.D. Ga. 1909); *Commonwealth v. Clary*, 8 Mass. 72 (1811); Interdepartmental Committee Report, Vol. II, pp. 184-85.

It is also clear that Plaintiffs are exempt from the State's compulsory education laws and possess no enforceable right to attend Maryland public schools, save so far as that right is provided them by agreement with state authorities. See 5 Opinions of the Attorney General of Maryland 129 (1920); 27 Opinions of the Attorney General of Maryland 116 (1942); 33 Id. 155 (1948); *Schwartz v. O'Hara Township*

School District, 375 Pa. 440, 100 A. 2d 621 (1953) and authorities cited; Interdepartmental Committee Report, Vol. I, p. 1; Vol. II, pp. 216-19 and authorities cited. In addition, Plaintiffs are exempt from state jury service (Interdepartmental Committee Report, Vol. II, p. 237), and are not subject to arrest and prosecution by state authorities for offenses committed on the Federal reservation. *Bowen v. Johnston*, 306 U.S. 19; *United States v. Unzueta*, 281 U.S. 138; *Mannix v. United States*, 140 F. 2d 250 (4th Cir. 1944); Interdepartmental Committee Report, Vol. II, pp. 105-09. They are arguably not subject to compulsory commitment in state mental institutions if found dangerous to themselves or to others. Compare *Bliss v. Bliss*, 133 Md. 61, 104 A. 467 (1918) with *Lowe v. Lowe*, 150 Md. 592, 603, 133 A. 729, 733 (1926) (Bond, C.J., concurring). See Interdepartmental Committee Report, Vol. II, p. 234, n. 55 on the practice of federal authorities in relation to this problem. Further, Plaintiffs are not subject to such other disabilities as those contained in state occupational licensing legislation, Interdepartmental Committee Report, Vol. II, p. 183; *Oklahoma City v. Sanders*, 94 F. 2d 323 (10th Cir. 1953); *Lynch v. Hammoch*, 204 Ark. 911, 165 S.W. 2d 369 (1942); 9 Opinions of the Attorney General of Maryland 164 (1924) 42 Id. 305 (1957), state minimum price fixing laws enacted subsequent to the date of cession, see *Paul v. United States*, 371 U.S. 245 (1963), and State liquor laws, see *Collins v. Yosemite Park Co.*, 304 U.S. 518 (1938). By grace of the State Legislature their children are permitted to attend the public schools, the State receiving in return payments from the Federal treasury which fall on the Nation's taxpayers at large including bona fide residents of Maryland.[7] It is

[7] The court below relied on these "impacted area" funds as a ground of its decision, thus dramatizing its *ad hoc* nature, since continuance of impacted area aid is currently the subject of sharp Congressional

clear that "in the absence of a contract with the Federal Government, the State is not obliged to provide the inhabitants of a Federal enclave with the government services that it provides for its own citizens, *Fort Leavenworth R. R. Co. v. Lowe* (1885), 114 U.S. 525; Report of Interdepartmental Committee for Study of Jurisdiction over Federal areas within the State, Part II * * *" *Mississippi River Fuel Co. v. Cocreham*, 382 F. 2d 929, 939, n. 19 (5th Cir. 1967). Plaintiffs here claim the right to vote in state and local elections including elections involving school bond issues and other education expenditures whose benefits their children will reap but whose costs Plaintiffs will be exempt from bearing. They seek power without responsibility with respect to questions involving additional appropriations that are the warp and woof of local government. They seek a voice in the election of prosecutors who cannot prosecute them for offenses committed at the place of their residence, other officials, such as Registers of Wills, who assess taxes that they are not required to pay (see Interdepartmental Committee Report, supra, Vol. II, pp. 230-36), and other officials of State government whose legislative, executive, and judicial authority over them is severely restricted.[8] In the event the decision below is upheld, the Plaintiffs will stand in a far more favorable position than true residents of Maryland, for they will be able to vote for state and local expenditures, and for candidates promising to increase them, secure in the knowledge that they will be immune from bearing the major part of these expenditures raised

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debate. The relevance of such aid was expressly denied by this Court in *Humble Oil and Refining Co. v. Waggoner*, 376 U.S. at 373.

[8] While the Assimilative Crimes Act gives the state legislature power to enact some laws applicable to plaintiffs not *ex proprio vigore* but by force of the federal policy embodied in the Federal statute where not inconsistent with Federal legislation, the authority has been narrowly restricted by supervening federal legislation governing serious offenses. The narrow scope of state authority is made clear in *United States v. Sharpnack*, 355 U.S. 286.

through an application of the State's most important and most flexible (as to rate) tax — the property tax.

The concessions to state authority made by the Buck Act were carefully designed as a *quid pro quo* for services usually rendered to residents of Federal enclaves by the states in which they visit.[9] Even foreign diplomats and consular officials are subject by usage and treaty to many state exactions as are resident aliens, but none would urge that they are entitled to the franchise on that account. No more than such persons do the Plaintiffs here owe any allegiance to the State of Maryland. Indeed, the matrix of immunity surrounding them exceeds that even of foreign nationals insofar as the state's powers to compel military service and assess property taxes are involved. Under these circumstances there is nothing irrational in any constitutional sense in the disqualification of the Plaintiffs from the franchise.

6. The careful balance between rights and responsibilities of residents of Federal enclaves should be altered, if at all, only by carefully drawn legislative enactment. The unfairness inherent in permitting persons to vote for higher local government expenditures and to elect local officials who are not liable for many local taxes and who are not subject to the authority of the persons for whom they vote is patent, cf. *Montoya v. Bolack*, 70 N.M. 196, 372 P. 2d 387, 395 (1962). It may be noted that some states, such as New

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[9] The Buck Act, significantly, expressly recites "the provisions of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any federal area." 4 U.S.C. §108. Where Congress has desired to allow residents of constitutional reservations the state franchise, it has done so by specific enactment. See 16 Stat. 399 (1871); 30 Stat. 668 (1898); 31 Stat. 1175 (Soldiers' homes); 63 Stat. 11 (1949) (Los Alamos). Interdepartmental Committee Report, Vol. II, pp. 85-93.

Hampshire, impose neither income nor sales taxes and derive no substantial benefits from the Buck Act. The most comprehensive study of the problems here at issue, the *Report of the Interdepartmental Committee for Study of Jurisdiction over Federal Areas within the States* (1956) urged solution of whatever problems do exist by retrocession of exclusive jurisdiction by the Federal government with respect to the many reservations not requiring extraterritoriality, as to which concurrent or proprietary jurisdiction is all that is required.[10] This solution, unlike that produced by the decree of the court below, would afford Plaintiffs *all* the privileges of state residents, but it would of course, strip them of their present immunities and confer on them responsibilities as well as rights, and thereby avoid the dilution of the franchise of *bona fide* residents produced by the District Court decree.

7. The decree of the District Court is unsupported by precedent, impairs the rights of *bona fide* residents of Maryland, and is violative of the exclusive control over ceded reservations confided to the federal government by the Constitution, and should be reversed.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,

ROBERT F. SWEENEY,
Deputy Attorney General of Maryland,

GEORGE W. LIEBMANN,
Assistant Attorney General of Maryland,

For Appellants.

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[10] See *Tanner v. McKeldin*, Eq. 13,373 (Cir. Ct. Fredk. Co. 1953); Interdepartmental Committee Rept., Vol. 1, pp. 70-72.

APPENDIX A

OPINION OF COURT

(Filed October 28, 1968)

In The United States District Court
for the District of Maryland

(Caption omitted)

THOMSEN, Chief Judge.

The twelve plaintiffs in this case are citizens of the United States who reside on the grounds of the National Institute of Health, a federal reservation in Montgomery County, Maryland. Prior to October 19, 1968, ten of the twelve plaintiffs were registered on the voters' registry in Montgomery County. On or about that date defendants, who are the members of the Permanent Board of Registry of Montgomery County, notified the ten that their names would be removed from the voters' registry in that County before the general election to be held on November 5, 1968, solely for the reason that they "reside on Federal property within Montgomery County and, as such, do not qualify for voting in Maryland under the State Constitution". See Article 1, section 1 of the Maryland Constitution, and *Royer v. Board of Election Supervisors for Cecil County*, 231 Md. 561, 191 A. 2d 446 (1963). For the same reason defendants have refused to register the other two plaintiffs.

Promptly after receiving such notice, plaintiffs consulted counsel, who prepared, filed and presented to me on Thursday, October 24, (1) a complaint, seeking declaratory and injunctive relief to prevent removal from the voters' registry the names of the ten plaintiffs who were registered, and to require the registration of the other two plaintiffs, and (2) a motion, supported by appropriate affidavits, for a temporary restraining order, a preliminary injunction and the convening of a three-judge court. Plaintiffs contend that the provision of the Maryland Constitution upon which defendants rely, as interpreted by the Maryland Court in *Royer*, violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

At the time the suit was filed the parties entered into a stipulation: (1) that the parties would cooperate to bring on for hearing promptly the motion for preliminary injunction; (2) that pending such hearing and determination by this court of said motion, defendants would take no steps to remove from the registry the names of nine of the ten registered plaintiffs;[1] and (3) that any party might move to modify the terms of the stipulation "to the same extent which such party would be entitled had the stipulation been in the form of a temporary restraining order issued after hearing".

On the same day oral notice of the application was given to Chief Judge Haynsworth of the Fourth Circuit,[2] and Judge Haynsworth designated Circuit Judge Winter and District Judge Harvey as the two other judges to serve on the three-judge court. Since Judge Winter will be engaged during the week of October 28 in hearing cases in Richmond, a hearing in this case was held on Friday, October 25, in the late afternoon. With commendable industry, counsel for defendants prepared and filed an answer, and the Deputy Attorney General of Maryland presented a reasoned argument at the hearing.[3] By agreement of the parties the case was submitted to the Court on the complaint, the answer and certain stipulations of fact.

The case presents a grave constitutional question, on which there appears to be a paucity of authority. The decision of the question will require careful consideration and will probably affect many persons, because of the number of federal reservations within the State of Maryland. Of necessity, the case was presented to the court with minimal opportunity for preparation by counsel or by the judges. Since the case was heard on complaint, answer and

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[1] No reason for the omission of the tenth name from the stipulation was indicated at the hearing, and the court is advised that it was omitted by inadvertence.

[2] The oral notice was promptly supplemented by the customary written notice under 28 U.S.C. 2284.

[3] The notice to the Governor and the Attorney General of the State (required by 28 U.S.C. 2284(2), was acknowledged.

stipulations, a final judgment can be entered at any time, but there will be no adequate opportunity before the election on November 5 for the study and conference which the importance of the case requires.

Therefore, the three judges believe that no final judgment should be entered at this time, but that I, to whom the application was made, should consider the issuance of a temporary restraining order.

Subsection 3 of 28 U.S.C. 2284 provides:

> "In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted."

It appears from the complaint, the answer and the stipulations that the plaintiffs will suffer irreparable damage, i.e., the denial of the right to vote in the election of November 5, 1968, if a temporary restraining order is not granted. But the ten plaintiffs who were already registered before October 19 are in a different status from the other two plaintiffs who were never registered. Since one of the recognized purposes of a temporary restraining order is to preserve the status quo, the temporary restraining order in this case will issue only as to the ten plaintiffs previously registered.

ORDER

Therefore, it is ORDERED by the United States District Court for the District of Maryland, this 28th day of October, 1968, at 4:00 p.m., that Rose K. Dawson and Marie M.

Garber, Members of the Permanent Board of Registry for Montgomery County, Maryland, be and they are hereby enjoined from removing the names of Tillye Cornman, Herbert Tabor, Celia White Tabor, Mary D. Pratt, Reynold R. Holliday, Elizabeth J. Holliday, Chris A. Hansen, Mary E. Hansen, Carlos Shultz and Frances Legallais from the voters' registry in Montgomery County until the further order of this court, or from denying them the right to vote at the election on November 5, 1968, and are hereby required to restore to the voters' registry the name of Frances Legallais if it has been removed. This order does not require defendants to register Edward Tabor and Elliot Vesell.

ROSZEL C. THOMSEN,

Chief Judge, U.S. District Court.

OPINION OF COURT

(Filed January 29, 1969)

In The United States District Court
for the District of Maryland

(Caption omitted)

Before WINTER, Circuit Judge, THOMSEN, Chief Judge, United States District Court, and HARVEY, District Judge.

Harvey, District Judge:

In this action brought under the Civil Rights Act,[1] plaintiffs challenge a provision of the Maryland Constitution which they claim has denied them the right to vote. Pursuant to 28 U.S.C. §2281, a three-judge court has properly been convened, and the case has been heard on the pleadings and stipulations of the parties.

All twelve plaintiffs reside on the grounds of the National Institute of Health, a federal reservation located within the geographical boundaries of Montgomery County, Maryland.

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[1] 28 U.S.C. §1343 and 42 U.S.C. §1983.

Ten of the twelve had been registered voters within the State of Maryland for many years until October 19, 1968 when they were advised by the defendants, who are members of the Permanent Board of Registry of Montgomery County, that their names would be removed from the County voters' registry because as residents of federal property they did not qualify for voting in Maryland under the State Constitution. Two of the plaintiffs attempted to register to vote in the general election to be held on November 5, 1968 but were not permitted to do so for the same reasons.

Plaintiffs thereupon filed this action seeking a declaratory judgment and injunctive relief which would prevent the removal from the voters' registry of the names of ten of the plaintiffs and which would require the registration of the other two plaintiffs. Plaintiffs also filed a motion together with affidavits seeking a temporary restraining order and a preliminary injunction. On October 25, 1968, which was one day after the complaint and motion were filed, a hearing was held before this Court. In view of the very short time for preparation on both sides, the Court did not attempt to render a decision on the merits of the case following that hearing. However, pursuant to 28 U.S.C. §2284(3), Chief Judge Thomsen entered an order on October 28, 1968 enjoining the defendants until further order of this Court from removing the names from the voters' registry of the ten plaintiffs who had previously been registered.[2] Such order did not require the defen-

[2] In the memorandum opinion accompanying his order, Judge Thomsen said the following:

> "The case presents a grave constitutional question, on which there appears to be a paucity of authority. The decision of the question will require careful consideration and will probably affect many persons, because of the number of federal reservations within the State of Maryland. Of necessity, the case was presented to the court with minimal opportunity for preparation by counsel or by the judges. Since the case was heard on complaint, answer and stipulations, a final judgment can be entered at any time, but there will be no adequate opportunity before the election on November 5 for the study and conference which the importance of the case requires."

dants to register the other two plaintiffs. Following the submission of briefs, another hearing before the Court was held on January 2, 1969 at which time the case was fully argued on the merits. Additional stipulations have likewise been filed.

The provision of the Maryland Constitution under attack is Article I, §1, which gives the right to vote to every citizen of the United States of the age of 21 years or more "who has been a resident of the state for one year, and of * * * the county, in which he may offer to vote, for six months next preceding the election, * * *". In *Royer v. Board of Election Supervisors*, 231 Md. 561 (1963), cert. den. 375 U.S. 921 (1963), the Court of Appeals of Maryland held that residents of a federal enclave located within the State of Maryland are not residents of the State for the purposes of voting. Plaintiffs claim that as so construed, §1 of Article 2 of the Maryland Constitution denies them the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. For the reasons hereafter stated, we agree.

Under Article I, section 8, clause 17 of the United States Constitution, Congress is empowered to "exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings". Ever since *Opinion of the Justices*, 42 Mass. 580 (1840), and *Sinks v. Reese*, 19 Ohio St. 306 (1869), it has been held in most of the cases considering the question that where the federal government has exclusive jurisdiction of an enclave, persons residing in such enclave are not state residents for voting purposes.[3] The rationale for these decisions was stated by the Court in *Sinks v. Reese* as follows, at page 316:

[3] In the *Royer* case, the Maryland Court of Appeals followed *Lowe v. Lowe*, 150 Md. 592 (1926), which held that a resident of a federal enclave in Cecil County had not acquired a State residence for the purpose of filing a divorce suit. Other state cases reaching the same result as to voting rights are collected in 34 A.L.R. 2d 1193-1202 (1954).

> "By becoming a resident [of the federal enclave], a person though up to that time he may have been a citizen and resident of Ohio, ceases to be such; he is relieved from any obligation to contribute to their revenues, and is subject to none of the burdens which she imposes upon her citizens. He becomes subject to the exclusive jurisdiction of another power, as foreign to Ohio as is the states of Indiana or Kentucky, or the District of Columbia."

In the earlier cases, there was little doubt that the United States had exclusive jurisdiction over the enclave in question. However, the issue is presented in a somewhat different light in the pending case as a result of the enactment by Congress of various statutes which have effected a retrocession to Maryland and other states of portions of the federal government's exclusive jurisdiction over federal enclaves and the exercise by Maryland of the powers which Congress has returned to the State.

Where the federal government has exclusive jurisdiction over land located within the geographical boundaries of a state, it can hardly be doubted that no constitutional right of a resident of the enclave is infringed by the state's refusal to grant such resident the right to vote. But it would be equally clear that if there were a retrocession by the federal government to a state of all or substantially all incidents of jurisdiction, such state could not constitutionally deny residents of the enclave the right to vote.[4] The facts of the present case lie somewhere in between these readily demonstrable extremes. The question here is whether Maryland has undertaken to impose on residents

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[4] See *Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States,* Part II (June 1957), pages 221-222. This Committee was formed in 1954 with the approval of President Eisenhower to study the problems arising out of the jurisdictional status of federally owned areas within the several states, which the Department of Justice had found to be "in a confused and chaotic state." Part I, page 2. The Committee noted that there were four categories of legislative jurisdiction over such areas: exclusive jurisdiction, concurrent jurisdiction, partial jurisdiction and proprietorial interest only. A discussion of these four categories may be found at pages 15-22 of Part I of the Report.

of this federal enclave obligations and duties of state citizenship to such a degree that it would amount to unconstitutional discrimination if the right to vote were not likewise granted. Determination of this question requires a balancing of the incidents of jurisdiction still retained by the federal government against those exercised by the State of Maryland as well as consideration of the nature of the right that plaintiffs claim has been denied to them.

Exclusive jurisdiction to lands acquired by the United States for general purposes was ceded by the State of Maryland to the federal government by virtue of Chapter 743 of the Acts of 1906, now codified as §§31, 36 and 37 of Article 96 of the Annotated Code of Maryland (1964 Repl. Vol.). Specific consent was given for the acquisition of the grounds of the National Institute of Health in Montgomery County by §34 of Article 96. Both §34 and §36 provide that the State shall retain the right to serve on the federal lands civil and criminal process of the courts of the State.[5]

The first of a series of enactments returning to the states portions of the federal government's exclusive jurisdiction over enclaves was passed by Congress in 1928. In that year, a statute was enacted which provided that in the case of the wrongful death of any person on a federal enclave, the same right of action would exist as though the place were under the jurisdiction of the state within whose exterior boundaries the place was. 16 U.S.C. §457. In 1936, Congress authorized the states to extend to such areas their workmen's compensation laws. 40 U.S.C. §290. In that same year, the Lea Act was passed which permitted the levying of gasoline and other motor vehicle fuel taxes upon fuels sold in federal enclaves. 4 U.S.C. §104.

In 1939, jurisdiction was returned to the states to enforce their unemployment insurance laws within the borders of federal lands. 26 U.S.C. §3305(d). The most extensive

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[5] The reservation of this right has been seen as an act of comity and not inconsistent with the exclusive jurisdiction of the federal government. *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 534 (1885).

and far reaching retrocession statute enacted by Congress was the Buck Act in 1940. 4 U.S.C. §§105-110. That enactment gave the states "full jurisdiction and power" to levy and collect sales, use and income taxes within federal enclaves. A 1947 enactment permitted the states to tax a lessee's interest in real estate leased by the federal government from within an enclave. 10 U.S.C. §2667(e).

Under the Assimilative Crimes Act, 18 U.S.C. §13,[6] the criminal laws of the states are applicable to federal enclaves, if the act or omission is not punishable by a Congressional statute. A 1948 amendment of this Act provides that the state law in force at the time of the act or omission governs if there is no pertinent federal law, eliminating the previous requirement of periodic re-enactments of the Act to keep abreast of changes in state penal laws. In 1950, Congress provided for payments by the federal government to local schools for the children of residents of federal reservations attending such schools. 20 U.S.C. §236 et seq.[7]

The Maryland Legislature, although not granting residents of federal enclaves within the State the right to vote, has conferred other benefits of State citizenship on such individuals. Following the decision of the Court of Appeals in *Lowe v. Lowe, supra,* the Legislature in 1927 permitted residents of federal enclaves to use the State courts for divorce matters. §23 of Article 16, Annotated Code of Maryland (1957 Ed.). Later it opened the State courts to such residents for adoption proceedings. §69, Article 16. Children of such residents are permitted to attend school in the counties in which are located the reservations where they live.

This cataloguing of State and federal enactments indicates that the concept of exclusive federal jurisdiction over

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[6] The first Assimilative Crimes Act was enacted in 1825 and has been amended on several occasions since then. See *Report of the Interdepartmental Committee,* Part II, pages 126-131.

[7] It should further be noted that plaintiffs are counted as residents of Maryland under the decennial census. Therefore, Maryland's apportionment of seats in the United States House of Representatives is based on a population figure which includes them.

reservations such as the one here involved has been drastically altered within the past 40 years. The plaintiffs here may be prosecuted under State criminal statutes, are subject to State unemployment and workmen's compensation laws, and have access to the State courts under acts permitting divorce and adoption proceedings. However, they have no voice in the selection of legislators who may amend these statutes or enact new ones which will affect their rights as to these matters. The children of these plaintiffs attend local schools in Montgomery County. Yet their parents have no voice in the selection of members of the school board. Income, sales and gasoline taxes are undeniably major sources of revenue for the State of Maryland. Although the plaintiffs here are compelled to pay such taxes, they may not participate in the election of the legislators responsible for the enactment of tax statutes within the State.

The rationale of the earlier decisions denying the right to vote to a resident of a federal enclave has been undercut by the various retrocessions by Congress of its otherwise exclusive jurisdiction. No longer is it true, as stated in *Sinks v. Reese, supra*, 19 Ohio St. at 401, that such a resident "is relieved from any obligation to contribute to [a state's] revenues and is subject to none of the burdens which she imposes upon her citizens." Nor is there validity today to the statements made by the Maryland Court of Appeals in 1926 in *Lowe v. Lowe, supra*, that such residents "are not residents of the State of Maryland * * * for taxation purposes" and that "the federal government has complete and exclusive jurisdiction and power of legislation" over a federal reservation within the State. 150 Md. at pages 600-601.

The theory of the extraterritoriality of a federal enclave was impliedly rejected by the Supreme Court in *Howard v. Commissioners of Louisville*, 344 U.S. 624 (1953). In that case, the issue was whether the City of Louisville could lawfully annex a federal enclave on which was located a Naval Ordnance Plant. The trial court had con-

cluded that since the federal government had exclusive jurisdiction over the reservation, it was no longer a part of the State of Kentucky, subject to annexation. The Court of Appeals of Kentucky reversed. *Commissioners of Sinking Fund v. Howard*, 248 S.W. 2d 340 (Ky. 1952). In affirming that decision, the United States Supreme Court said the following (344 U.S. at 626-627):

> "A state may conform its municipal structures to its own plan, so long as the state does not interfere with the exercise of jurisdiction within the federal area by the United States. Kentucky's consent to this acquisition gave the United States power to exercise exclusive jurisdiction within the area. A change of municipal boundaries did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property. *The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government.* The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aims. It is friction, not fiction to which we must give heed." (Emphasis added.)

The State of Maryland here argues that since substantial portions of the federal government's exclusive jurisdiction over this land is still retained by the United States, the State is constitutionally justified in declining to permit plaintiffs to vote. In particular, it is noted that the plaintiffs pay no property taxes,[8] that they are exempt from personal service as a part of the State's unorganized militia, that their children are not subject to State compulsory education laws and that they are exempt from State jury service. That the federal government still retains wide authority over this federal enclave does not answer the

[8] Property taxes account for about 50% of the operating budget of the Montgomery County Board of Education and about 12% of the operating budget of the County itself.

question before the Court, for it is likewise clear that in the aggregate the jurisdiction over plaintiffs that has been returned to Maryland is extensive. We are not concerned here with Maryland's refusal to grant to residents of a federal enclave ordinary rights and privileges given to other citizens of the State. The question before the Court is whether the State can constitutionally withhold from these plaintiffs a right as vital as the right to vote.

Exercise of the elective franchise has always been considered one of the most basic of those rights enjoyed by a citizen of a free democratic society. In *Carrington v. Rash*, 380 U.S. 89 (1965), the Supreme Court had before it a challenge to a provision of the Texas Constitution which prohibited from voting in State elections any member of the armed forces moving to Texas during his tour of duty. In finding that such a prohibition was an invidious discrimination in violation of the Fourteenth Amendment, the Court said the following at page 96:

> "We deal here with matters close to the core of our constitutional system. 'The right . . . to choose,' *United States v. Classic*, 313 U.S. 299, 314, that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State. *Oyama v. California*, 332 U.S. 633."

In the more recent case of *Williams v. Rhodes*, 393 U.S. 23, (decided October 15, 1968), the Court reaffirmed its statement in *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), in which it said the following with reference to the right to vote (at page 31):

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined,".

We conclude that on balance the plaintiffs here are treated by the State of Maryland as state residents to such

an extent that it is a violation of the Fourteenth Amendment for the State to deny them the right to vote. A state may not subject an individual who resides within its geographical boundaries to substantial obligations of citizenship and at the same time deny such individual the correlative right to exercise a voice in defining the nature and extent of such obligations. It is no answer to say that there are many rights and obligations of citizens of Maryland which are not enjoyed by or have not been assumed by these plaintiffs. Without determining which way the scales would tip with respect to other rights, we are of the opinion that the incidents of jurisdiction exercised by Maryland over these plaintiffs are sufficiently weighty that the important right claim here cannot be constitutionally denied.

Similar reasoning was employed by the Court in *Arapajolu v. McMenamin*, 113 Cal. App. 2d 824, 249 P. 2d 318, 34 A.L.R. 2d 1185 (1952),[9] a decision of the California District Court of Appeal, review of which was denied by the Supreme Court of California. In finding that a resident of a federal enclave located within the state of California was a resident of the state entitled to vote, the court said the following (34 A.L.R. 2d at 1191-1192):

> "The jurisdiction over these lands is no longer full or complete or exclusive. A substantial portion of such jurisdiction now resides in the States and such territory can no longer be said with any support in logic to be foreign to California or outside of California or without the jurisdiction of California or within the exclusive jurisdiction of the United States. It is our conclusion that since the State of California now has jurisdiction over the areas in question in the substantial particulars above noted residence in such areas is residence within the State of California entitling such residents to the right to vote given by sec. 1, Art. II of our Constitution."

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[9] Two other state courts have likewise held residents of a federal enclave to be residents of the state for voting purposes. *Adams v. Landree*, 139 W. Va. 748, 83 S.E. 2d 127 (1954) and *Rothfels v. Southworth*, 11 Utah 2d 169, 356 P. 2d 612 (1960).

For the reasons stated, plaintiffs are entitled to the relief that they are seeking. Counsel should prepare and submit within ten days an appropriate order.

HARRISON L. WINTER,
United States Circuit Judge.

ROSZEL C. THOMSEN,
Chief Judge, United States District Court.

ALEXANDER HARVEY, II,
United States District Judge.

February 19, 1969

Richard Schifter, Esq.
1700 K Street, N.W.
Washington, D. C. 20006

George W. Liebmann, Esq.
Assistant Attorney General
1200 One Charles Center
Baltimore, Maryland 21201

Re: Cornman v. Dawson — Civil No. 20028

Gentlemen:

The Court has received and has considered the proposed orders submitted by each of you with reference to the above case.

All three judges have concluded than an order should be entered in this case in the form submitted by Mr. Schifter. Such Order was signed and filed with the Clerk today.

I might add that there is nothing in the Order to prevent the State from filing a notice of appeal or from pursuing whatever other rights it may have in this case. We agreed upon Mr. Schifter's form of order so that the plaintiffs would not be prevented from voting this fall if there is a special election.

Very truly yours,

ALEXANDER HARVEY, II,
United States District Judge.

ORDER

(Filed February 19, 1969)

United States District Court for the District of Maryland

(caption omitted)

In accordance with the opinion of the United States District Court for the District of Maryland, dated 29th January 1969:

It is hereby ORDERED by the United States District Court for the District of Maryland, this ..... day of February, 1969 that Rose K. Dawson and Marie M. Garber, Members of the Permanent Board of Registry for Montgomery County, Maryland, be and they hereby are permanently enjoined from removing the names of Tillye Cornman, Herbert Tabor, Celia White Tabor, Mary D. Pratt, Reynold R. Holliday, Elizabeth J. Holliday, Chris A. Hansen, Mary E. Hansen, Carlos Schultz and Frances Legallais from the voters' registry in Montgomery County as long as such removal is based on the contention that their residence on the NIH enclave does not constitute residence in the State of Maryland; and Rose K. Dawson and Marie M. Garber are further ordered to cease and desist from refusing to place on said voters' registry the names of Edward Tabor and Elliot Vesell on the ground that their residence on the NIH enclave does not constitute residence in the State of Maryland.

HARRISON L. WINTER,

United States Circuit Judge.

ROSZEL C. THOMSEN,

Chief Judge, United States District Court.

ALEXANDER HARVEY, II,

United States District Judge.

APPENDIX B

MOTION TO INTERVENE

(Filed March 17, 1969)

In The United States District Court
for the District of Maryland

(caption omitted)

Francis B. Burch, Attorney General of Maryland, and Wm. Evans, Marshall W. Jones, Jr., and Betty M. Silbert, Members of the Board of Supervisors of Elections of Baltimore City move pursuant to Rules 24 (a) (2) and 24 (b) (1) and (2) of the Federal Rules of Civil Procedure, to intervene as parties defendant in this action and for reasons state:

1. At the request of the attorney for the Montgomery County Board of Elections, the office of the Attorney General of Maryland participated in the defense of this cause from its inception and has for all effective purposes participated in this litigation to the same or a greater extent than a party thereto.

2. In its opinion granting temporary relief dated October 28, 1968, the Court took note of the participation of the office of the Attorney General of Maryland and also noted that notice had been given to the Attorney General of Maryland pursuant to the provisions of 28 U.S.C.A., Section 2284 (2).

3. The office of the Attorney General of Maryland represented defendants at the final hearing and prepared defendants' brief.

4. By the provisions of Article 32A, Section 2 of the Code of Public General Laws of Maryland, the Attorney General of Maryland is designated as the legal advisor and representative to all "boards, commissions, departments, officers or institutions of the State government" including the Secretary of State of Maryland but not including the county boards of elections, and by the same section, the Attorney General of Maryland is designated as "the legal

advisor and representative of" the Board of Supervisors of Elections of Baltimore City.

5. The decision of this Court in the instant case relates to a subject of general importance to all sub-divisions of the State, including Baltimore City, in which federal reservations are situated. Several Federal reservations under the exclusive jurisdiction of the federal government, including some with a substantial number of residents, exist within Baltimore City. The decision of the Court is in direct conflict with the decision of the Maryland Court of Appeals in the case of *Royer v. Board of Election Supervisors*, 231 Md. 561 (1963). Resolution by the Supreme Court of the conflict between these decisions is desirable in order to clarify the law applicable in this State and throughout the Nation with respect to the voting rights of residents of federal reservations and in order to permit the Attorney General of Maryland to accurately advise State agencies, including the Board of Supervisors of Elections of Baltimore City, as to the controlling law. The interest of uniformity in application throughout the State likewise appears to demand that pending decision by the Supreme Court of the United States, the Attorney General of Maryland be a party to and bound by the decision of the District Court.

6. The Attorney General of Maryland has been advised that counsel for the defendants, members of the Board of Supervisors of Elections of Montgomery County, do not intend to appeal this judgment. The Attorney General of Maryland has, however, been further advised, and is authorized to advise this Honorable Court, that neither counsel for the Board of Supervisors of Elections of Montgomery County, nor counsel for plaintiffs, have any objection to the intervention as a defendant of the Attorney General for the purpose of prosecuting an appeal. By reason of his position as legal advisor to State agencies, and his position as attorney for the Board of Supervisors of Elections of Baltimore City, the Attorney General of Maryland possesses an interest related to the subject matter of the action such that the disposition of the action may as a practical

matter impair or impede his ability to protect that interest within the meaning of Rule 24 (a) (2); and that the Board of Supervisors of Elections of Baltimore City possesses a similar interest. It is clear that by reason of the intention of counsel for the Montgomery County Board of Elections not to appeal that the Attorney General's interest and that of the Board of Supervisors of Elections of Baltimore City are not adequately represented by existing parties.

7. The positions of the Attorney General of Maryland and the Board of Supervisors of Elections of Baltimore City are identical to the position of the Board of Supervisors of Elections of Montgomery County in relation to this action, in that both assert by way of defense that the provisions of Article I, Section 1 of the Maryland Constitution are valid and constitutional and bar the relief sought by the plaintiffs. The defenses of the Attorney General and Baltimore City Board as intervening parties defendant thus have a question of law or fact in common with that of the named defendants in this action within the meaning of Rule 24 (b) (2). Since no stay has been granted by this Court, allowance of intervention will not delay the adjudication of the rights of the original parties.

8. The Attorney General possesses a conditional right to intervene under the terms of 28 U.S.C.A., Section 2284 (2) within the meaning of Rule 24 (b) (1).

9. The Motion to Intervene is timely, the Attorney General of Maryland having been invited to participate in this litigation at its inception as co-counsel by counsel for defendants, no formal intervention being necessary at that time, and not having been advised by counsel for defendants of their intention not to appeal until filing of this Court's opinion and entry of decree.

Wherefore, Francis B. Burch as Attorney General of Maryland and as legal representative of the Board of Supervisors of Elections of Baltimore City moves that the members of the Board of Supervisors of Elections of Baltimore City and the Attorney General of Maryland be granted

leave to intervene as parties defendant in the above entitled action and be granted leave to file the annexed Answer.

FRANCIS B. BURCH,
Attorney General of Maryland and Attorney for the Board of Supervisors of Elections of Baltimore City,

ROBERT F. SWEENEY,
Deputy Attorney General,

GEORGE W. LIEBMANN,
Assistant Attorney General.

Carl Lee Frederick, Jr.
Attorney at Law
Equitable Savings Building
11501 Georgia Avenue
Wheaton, Maryland 20902

March 5, 1969

Honorable Alexander Harvey, II
Judge, United States District Court
Fayette & Calvert Streets
Baltimore, Maryland 21202

Re: Corman, et al v. Dawson, et al
Civil No. 20028

Dear Judge Harvey:

At the request of the Attorney General for the State of Maryland, I am writing this letter to advise the Court that the Defendants in the above captioned cause, Rose K. Dawson and Marie M. Garber, have no objection to the Attorney General intervening as a party Defendant in Civil No. 20028.

Your consideration in this matter is sincerely appreciated.

Very truly yours,

CARL LEE FREDERICK, JR.,

Attorney for Defendants,
Rose K. Dawson and
Marie M. Garber.

ORDER

(Filed April 10, 1969)

In The United States District Court
for the District of Maryland

(caption omitted)

Upon the Motion To Intervene filed by Francis B. Burch, Attorney General of Maryland, and William Evans, Marshall W. Jones, Jr. and Betty M. Silbert, members of the Board of Supervisors of Elections of Baltimore City on March 17, 1969; and no objection having been filed thereto; and after consultation and approval of this Order by all three of the Judges sitting in this case, it is

ORDERED this 10th day of April, 1969, that leave be granted the said Francis B. Burch, Attorney General of Maryland, and the said William Evans, Marshall W. Jones, Jr. and Betty M. Silbert, members of the Board of Supervisors of Elections of Baltimore City, to intervene as parties defendant in this action and to file the Answer annexed to the Motion To Intervene.

ALEXANDER HARVEY, II,

United States District Judge.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 236

WILLIAM EVANS, Member of the
BOARD OF SUPERVISORS OF ELECTIONS
OF BALTIMORE CITY, *et al.*,

Appellants,

v.

TILLYE CORNMAN, *et al.*,

Appellees.

On Appeal from the United States District Court
for the District of Maryland

MOTION TO AFFIRM

Of Counsel:

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IN THE

Supreme Court of the United States

October Term, 1969

No. 236

WILLIAM EVANS, Member of the
BOARD OF SUPERVISORS OF ELECTIONS
OF BALTIMORE CITY, *et al.*,

Appellants,

v.

TILLYE CORNMAN, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Maryland

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MOTION TO AFFIRM

Appellees, pursuant to Rule 16(1)(c) of the Revised Rules of the Supreme Court of the United States, move that the final order of the District Court be affirmed on the ground that the questions raised are, in light of recent decisions of this Court, so unsubstantial as not to warrant further argument.

QUESTIONS PRESENTED

1. Is a tract of land which is located within the geographic boundaries of the State of Maryland, from whose residents the State of Maryland and/or one of its subdivisions collect income, sales, use, unemployment insurance, gasoline and other motor vehicle fuel taxes and over whom the State exercises certain other sovereign powers, to be deemed not part of said State for the purpose of the voting rights of its residents solely because the federal government exercises jurisdiction over it under the provisions of Article I, Section 8, Clause 17 of the United States Constitution?

2. Where certain apartment dwellers on a tract of land within the geographic boundaries of the State of Maryland pay to the State and its subdivisions the same taxes paid by all other apartment dwellers within the State, may be prosecuted under State criminal statutes, are subject to State unemployment and workmen's compensation laws, and have access to the State courts for divorce and adoption proceedings, does the State's action in depriving these apartment dwellers of their franchise solely because their landlord, the federal government, does not pay property taxes to the State and the State courts do not have jurisdiction over offenses committed by them at their place of residence, comport with the requirements of the equal protection clause?

STATEMENT OF THE CASE

This is a direct appeal from the decision of a three-judge court holding that the State of Maryland could not, consistent with the requirements of the equal-protection clause, exclude residents of a federal enclave from the State's voter registry. The opinion of the court below is reported at 295 F. Supp. 654 (D. Md. 1969) and is reprinted in the Appellants' Appendix, pp. 4a-15a.

All appellees reside on the grounds of the National Institutes of Health, (hereinafter referred to as "NIH"), a federal reservation located within the geographical boundaries of Montgomery County, Maryland. Ten of the appellees had been registered voters within the State of Maryland for many years. On October 19, 1968, they were advised by the members of the Permanent Board of Registry of Montgomery County, that their names would be removed from the County voters' registry because as residents of federal property they did not qualify for voting in Maryland under the State Constitution.[1] The other two appellees attempted to register to vote during 1968, but were not permitted to do so for the same reasons.

The action of the Board of Registry was based upon a Maryland Court of Appeals decision, *Royer v. Board of Election Supervisors,* 231 Md. 561, 191 A.2d 446, *cert. denied,* 375 U.S. 921 (1963). *Royer* had held that a person residing on a so-called federal enclave located within Maryland was not a resident of the State within the meaning of Article I, Section 1 of the Maryland Constitution,[2] and that, therefore, such a person was not entitled to vote in state or federal elections.

Contending that the decision in the *Royer* case violated the equal protection clause of the fourteenth amendment

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[1] Appellants contend that those appellees who were permitted to enroll as voters registered "by inadvertance". The fact is that there is no evidence in the record to suggest that any resident of the NIH tract had been denied the franchise at any time prior to 1968. NIH residents had up to that time participated in the electoral process without any hindrance.

[2] Article I, Section 1 of the Maryland Constitution grants the franchise to every citizen of the United States, twenty-one years of age or more "who has been a resident of the State for one year."

to the United States Constitution, appellees sought a declaratory judgment and injunctive relief prohibiting the individual members of the Montgomery County Board of Registry from removing the names of the ten appellees already registered and to compel the registration of the two appellees seeking to vote for the first time. A three-judge court was convened pursuant to 28 U.S.C. §2281 and a hearing held on October 25, 1969, just ten days prior to Election Day. In its initial decision the court recognized the "grave constitutional question" raised by appellees, but, rather than immediately rendering a decision on the merits, ordered the *status quo* maintained pending further briefs and oral argument.[3] Thus under the court's initial order only those appellees previously registered were allowed to vote in the November 1968 election.

On January 29, 1969, the three-judge court unanimously ruled that the interpretation placed on the word "resident" by the Maryland Court of Appeals in *Royer v. Board of Supervisors, supra,* deprived appellees of the equal protection of the laws. An order granting appellees the relief sought was then issued. The Maryland Attorney General indicated a desire to appeal the court's order, but the named defendants, the Permanent Board of Registry of Montgomery County, demurred. Thereafter, on March 17, 1969, the Attorney General of Maryland and members of of the Board of Supervisors of Elections of Baltimore City filed a motion to intervene as parties defendant. The court below, with the consent of the defendants below and with no objection interposed by appellees, granted the motion to intervene and this appeal followed.

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[3] Appellants' statement that "ten of the twelve plaintiffs were on or about October 18, 1968 removed from the voting rolls" (Jurisdictional Statement, p. 6) is in error. These plaintiffs were threatened with removal of their names but were not actually removed from the registry.

ARGUMENT

The decision in *Royer v. Board of Supervisors, supra,* is based upon a doctrine concerning the legal status of federal enclaves evolved in the Nineteenth Century upon facts then obtaining. Specifically, this doctrine was premised upon the finding that a resident of a federal enclave was not a resident of the State wherein the enclave was located because, according to one of the early decisions in this area, he is "relieved from any obligation to contribute to her [the state's] revenues, and is subject to none of the burdens which she imposes on her citizens. He becomes subject to the exclusive jurisdiction of another power, as foreign to Ohio as is [sic] the states of Indiana or Kentucky or the District of Columbia." *Sinks v. Reese,* 19 Ohio St. 306, 316 (1869). However, as the district court in the present case, 295 F. Supp. at 655-659 (Appellants' App. at 6a-12a), demonstrates, the factual premise underlying *Sinks v. Reese* no longer exists. Under State and federal laws enacted since the decision in *Sinks,* particularly in the last forty years, "the concept of exclusive federal jurisdiction over reservations . . . has been drastically altered." 295 F. Supp. at 657 (Appellants' App. at 9a-10a) In fact, as the opinion below makes clear, there is virtually no difference between the enclave and non-enclave resident and there is certainly no meaningful distinction between them.[4]

---

[4] The NIH tract is located in the heart of the Bethesda community. It has for many years, and up to this date, been part of Precinct 8 of Election District 7 of Montgomery County, as defined by the County's Board of Elections Supervisors, in accordance with the provisions of Md. Ann. Code 1957, Art. 33, §2-12 (1968 Supp.). Appellees, who have resided on the tract for up to twenty years, pay income taxes to Montgomery County and the

(Cont'd)

In recent years, several state courts have recognized the artificiality of the rationale upon which the enclave doctrine was premised and have held enclave residents entitled to exercise the franchise. See *Rothfels v. Southworth*, 11 Utah 2d 169, 356 P.2d 612 (1960); *Adams v. Londeree*, 139 W. Va. 748, 83 S.E.2d 127 (1954); *Arapajolu v. McMenamin*, 113 Cal. App. 2d 824, 249 P.2d 318, 34 A.L.R.2d 1185 (1952). Indeed, the *Royer* court itself was aware that significant changes had taken place in the relationship between the state and the enclave resident in recent decades, but *Royer* concluded that any "adjustment" respecting the right to vote should be made by "the sovereign legislative bodies and not imposed by the courts." 191 A.2d at 449.

(Footnote 4 continued)

State of Maryland, pay sales taxes to the State for purchases on the tract on which they reside, register their cars with the State of Maryland, and obtain Maryland drivers' licenses. They participate actively in the life of the community, belonging to religious congregations in the area and other community groups. Their children attend the schools of Montgomery County as residents, without paying tuition. For each such child attending public school Montgomery County receives an allotment of federal funds under Public Laws 815 (20 U.S.C. §§631-645) and 874 (20 U.S.C. §§236-244) of the 81st Congress which is double the allotment made for the children of federal employees who do not reside on federal property. Appellees are subject to the service of state process at their homes (Md. Ann. Code 1957, Art. 96, §34) and are subject to Maryland's unemployment (26 U.S.C. §3305) and workmen's compensation laws (40 U.S.C. §290). They are counted as residents of Maryland under the decennial census and Maryland's apportionment of seats in the House of Representatives is based on a population figure which includes them. Ten of the appellees have been Maryland voters for up to nineteen years. None of them can claim a residence elsewhere in the United States.

It is precisely on this last point – the abdication of judicial responsibility for insuring all citizens an equal voice in elections – that *Royer* is in direct conflict with a host of recent opinions by this Court. See, *e.g.*, *Kramer v. Union Free School District No. 15*, ___ U.S. ___, 23 L. Ed. 583 (1969); *Cipriano v. City of Houma*, ___ U.S. ___, 23 L. Ed. 647 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

I.

Before considering the opinions of this Court which compel the result reached below, it is important to emphasize what is *not* at issue in this case. Appellees do not question the right of a state to establish reasonable residence requirements before allowing a citizen to exercise the franchise. Cf. *Drueding v. Devlin*, 234 F. Supp. 721 (D. Md. 1964), *aff'd.*, 380 U.S. 125 (1964). Nor does this case cast any doubt upon the state's right to determine the *bona fides* of any prospective voter's assertion of state residency. Cf. *Carrington v. Rash, supra*. Indeed, the only issue presented is whether a state may declare that a citizen's decision to reside on a federal enclave within that state *ipso facto* disqualifies him from exercising his fundamental right to vote.

Moreover, the State does not challenge the proposition that all appellees would be eligible to vote if only they chose not to live on the grounds of the National Institutes of Health. Nor does the State question that the land upon which appellees reside was a part of Maryland until 1953 when the Maryland legislature ceded the same to the United States pursuant to Article I, Section 8,

Clause 17 of the United States Constitution. See Md. Ann. Code 1957, Art. 96, §34. Instead, Maryland argues that the 1953 cession resulted in the permanent disunion between the State and the enclave and created, in effect, a state within a state.

The State's position, premised on the concept of extra-territoriality of federal enclaves, is directly contrary to the opinion of this Court in *Howard v. Commissioners of Louisville*, 344 U.S. 624 (1953). The question before the Court in *Howard* was whether a federal enclave on which a Naval Ordnance Plant was located could be lawfully annexed by the City of Louisville. It was not disputed that the United States exercised exclusive jurisdiction over the enclave. From that fact the trial court had concluded that the tract was no longer a part of the Commonwealth of Kentucky and thus could not be annexed by the City. This Court disagreed:

> "When the United States, with the consent of Kentucky, acquired the property on which the Ordnance Plant is located, the property did not cease to be a part of Kentucky. The geographical structure of Kentucky remained the same. . . . A state may conform its municipal structures to its own plan, so long as the state does not interfere with the exercise of jurisdiction within the federal area by the United States. Kentucky's consent to this acquisition gave the United States power to exercise exclusive jurisdiction within the area. A change of municipal boundaries did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property. *The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference*

> *with the jurisdiction asserted by the Federal Government.* The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aims. It is friction, not fiction to which we must give heed." (Emphasis supplied.) 344 U.S. at 626-627.

Since the concept of the extraterritoriality of federal enclaves is deemed a fiction with respect to municipal annexation laws, certainly extraterritoriality must be viewed as a fiction where the issue at stake is what the District Court characterized as "one of the most basic of those rights enjoyed by a citizen of a free democratic society." 295 F. Supp. at 659 (Appellants' App. at 12a.)

II.

Carrington v. Rash, supra; Kramer v. Union Free School District No. 15, supra; and *Cipriano v. City of Houma, supra,* so obviously compel the result reached by the three-judge court as to obviate the need for further argument and render the questions posed by this appeal unsubstantial. See, also, *e.g., Williams v. Rhodes, supra; Reynolds v. Sims, supra; Wesberry v. Sanders, supra; Baker v. Carr, supra.* It is now axiomatic that "no state can pass a law regulating elections that violates the Fourteenth Amendment's command that 'No state shall . . . deny to any person . . . the equal protection of the laws.'" *Williams v. Rhodes, supra,* at 29.

There is no dispute as to Maryland's inherent authority to grant appellees and persons similarly situated the franchise. Thus, when the Maryland Court of Appeals in *Lowe v. Lowe,* 150 Md. 592, 133 Atl. 729 (1926), held that Maryland courts had no jurisdiction to dissolve a marriage of residents who resided within a federal enclave, the legislature immediately altered the *Lowe* result by

statute. See Md. Ann. Code 1957, Art. 16, §23. Likewise, the Maryland Court of Appeals showed in the *Royer* case that the State could, if it chose, grant the franchise to enclave residents. Compare *Rothfels v. Southworth, supra; Adams v. Londeree, supra; Arapajolu v. McMenamin, supra.*

Maryland's capacity to grant appellees the franchise is most pertinent to the proper evaluation of the State's argument that the distinction between residents of enclaves and other residents of the state is a rational, reasonable classification and not an invidious classification prohibited by the fourteenth amendment. Even before the decision in *Kramer v. Union Free School District No. 15, supra*, it was clear that state restrictions on the right to vote were to be viewed with utmost suspicion and were to be sustained only upon the state's demonstration of a compelling interest in maintaining the restrictions. *Harper v. Virginia State Board of Elections, supra,* at 670; *Reynolds v. Sims, supra,* at 561-62 (1964). *Kramer,* however, removed all doubts:

> "Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. . . . *Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable.* See *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 670 (1966). The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government

> are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality." 23 L. Ed. at 589-90 (Footnotes omitted) (Emphasis supplied).

In view of Maryland's reliance in the present case upon appellees' immunity from property taxation (see Jurisdictional Statement, pp. 13-16), the excluded taxpayer's successful arguments in *Kramer* that "the level of property taxation affects him even though he does not own property, as property tax levels affect the price of goods and services in the community" and that "all members of the community have an interest in the quality and structure of public education" are particularly relevant.[5] The impact of *Kramer* and *Cipriano* upon the present case is clear. Both *Kramer* and *Cipriano* dealt with state statutes which, in certain special elections, limited the franchise to a portion of the state's regularly qualified electorate. Both New York and Louisiana sought to justify the discrimination inherent in their respective statutes by

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[5] As it is, appellants' contentions that appellees are "effectively exempt from the levy which supplies the lion's share of the revenues of local and county governments" (Jurisdictional Statement, p. 12) and that "education expenditures [are] benefits their children will reap but whose costs Plaintiffs will be exempt from bearing" (*Id.*, p. 15) simply do not correspond to the facts. The District Court found that property taxes account for about 50% of the operating budget of the Montgomery County Board of Education and about 12% of the non-education operating budget of Montgomery County. The obverse of their finding is that plaintiffs pay the taxes which fund 50% of the County's education operating budget and 88% of its non-education operating budget. See 295 F. Supp. at 658, n. 8 (Appellants' App. at 11a).

arguing that the state had a legitimate objective in limiting the franchise to those "primarily interested" in the election results. In each case this Court assumed *arguendo* that a state, under some circumstances, might so qualify the franchise but concluded that in both situations those excluded from the franchise were not in fact "substantially less interested or affected than those the statutes includes." 23 L. Ed. at 592; 23 L. Ed. at 651.

In the present case it cannot be gainsaid that each resident of the NIH tract is "substantially affected" by decisions of elected officials, from the President of the United States to members of the Montgomery County Board of Education. Thus, the court below correctly concluded:

> "[T]he plaintiffs here are treated by the State of Maryland as state residents to such an extent that it is a violation of the Fourteenth Amendment for the State to deny them the right to vote. A state may not subject an individual who resides within its geographical boundaries to substantial obligations of citizenship and at the same time deny such individual the correlative right to exercise a voice in defining the nature and extent of such obligations. . . . Without determining which way the scales would tip with respect to other rights, we are of the opinion that the incidents of jurisdiction exercised ty Maryland over these plaintiffs are sufficiently weighty that the important rights claimed here cannot be constitutionally denied." 295 F. Supp. at 659 (Appellants' App. at 13a.)

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the decision of the District Court was correct, that the questions raised by appellants are unsubstantial and that the order of the court below should, therefore, be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 236

WILLIAM EVANS, ETC., ET AL.,
Appellants,

v.

TILLYE CORNMAN, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF OF THE APPELLANTS

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IN THE

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OCTOBER TERM, 1969

No. 236

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Appellants,

v.

TILLYE CORNMAN, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF THE APPELLANTS

OPINION BELOW

The opinion and order of the United States District Court for the District of Maryland is reprinted at A. 17-27. The opinion is also reprinted at 295 F. Supp. 654.

JURISDICTION

This suit was brought under 28 U.S.C., §§1343, 1357, 2201, and 2202 and 42 U.S.C., §§1983 and 1988 to restrain actions of the Permanent Board of Registry for Montgomery County, Maryland, refusing to register two of the plaintiffs on the voting registry of the State and threatening to remove the other plaintiffs (who had been permitted to

register) from the voting registry. The complaint, which prayed the convening of a three-judge District Court, sought to enjoin, and the final decree enjoined, the application to the plaintiffs of the provisions of Article I, Section 1 of the Maryland Constitution, which, as authoritatively construed by the Maryland Court of Appeals, provides that residents of reservations under the exclusive territorial jurisdiction of the federal government are ineligible for the state franchise. The final decree of the three-judge District Court enjoining enforcement of the state constitutional provisions as to the plaintiffs was entered on February 19, 1969. An order permitting the Attorney General of Maryland and the Board of Supervisors of Elections of Baltimore City to intervene as parties defendant was entered on April 10, 1969 pursuant to Motion filed on March 17, 1969, no objection thereto having been filed by plaintiffs and entry of the order having been consented to by the defendant members of the Permanent Board of Registry for Montgomery County. Notice of Appeal was filed in the District Court on April 14, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C., §1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Alabama Pub. Serv. Comm. v. Southern Ry. Co.*, 341 U.S. 341, 343-44 (1951) n. 3; *Davis v. Mabry*, 380 U.S. 251 (1965); *McDonald v. Bd. of Election Commrs. of Chicago*, 22 L. Ed. 2d 739 (1969).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clause 17 of the Constitution of the United States, which enables Congress to acquire exclusive jurisdiction over "forts, dockyards, and other needful buildings", reads as follows:

"[The Congress shall have the power to] exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Article I, Section 1 of the Constitution of Maryland, declared unconstitutional by the District Court as applied to the named plaintiffs, reads, in pertinent part, as follows:

"All elections shall be by ballot; and every citizen of the United States, of the age of twenty-one years, or upwards, who has been a resident of the State for one year, and of the Legislative District of Baltimore city, or of the county, in which he may offer to vote, for six months next preceding the election, shall be entitled to vote, in the ward or election district, in which he resides, at all elections hereafter to be held in this State. . . ."

Article 96, §34 of the Code of Public General Laws of Maryland, enacted by Chapter 158 of the Acts of 1953, provides, with respect to the site of plaintiffs' residence, that:

"(a) *Consent to acquisition*

The consent of the State of Maryland is hereby given in accordance with Article I, §8, clause 17 of the Constitution of the United States to the acquisition by the United States for public health purposes of the

following described tract of land lying within Montgomery County:

[metes and bounds omitted]

Comprising approximately 317.7 acres as shown on plot of survey, site 1-28. 'National Institutes of Health — Montgomery County, Maryland' prepared by Maddox and Hopkins, Civil Engineers, Silver Spring, Maryland, dated January, 1948, revised May 27, 1948.

"(b) *Jurisdiction* — Exclusive jurisdiction over the parcel of land described in subsection (a) of this section shall be and the same is hereby ceded to the United States for all purposes except that the State retains the right to serve thereon all civil and criminal process of the courts of this State,[1] but the jurisdiction so ceded shall not vest as to all or any portion of the said parcel of land unless and until the United States shall own it, and the jurisdiction shall continue no longer than the United States shall own such land."

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment to the Constitution of the United States require that residents of federal enclaves, over which the Congress of the United States retains exclusive jurisdiction, be afforded the right to vote in the state in which the enclave is situated?

2. Would the relief sought by the Appellees more appropriately be granted by the Congress of the United States?

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[1] It has long been clear that such a limited reservation by the State does not defeat exclusive federal jurisdiction. Art. I, Sec. 8, Cl. 17 itself makes this clear, as do federal statutes. "A cession by a State of jurisdiction . . . shall be deemed sufficient . . . notwithstanding it contains a reservation that process issued under authority of such State may continue to be served within such place." 1 Stat. 426 (1795), 33 U.S.C.A. § 728, see *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 at 533-34 (1885); *United States v. Cornell*, Fed. Case No. 14,867 (D.R.I. 1819) (Story, J.).

STATEMENT

The present case involves the validity of Article I, Section 1 of the Constitution of Maryland, limiting the right to vote in state and local elections to "citizen[s] of the United States . . . who [have] been resident[s] of the State for one year, and of . . . the county . . . for six months next preceding the election . . ." The constitutionality of the one-year residence period provided by the State Constitution was upheld by this Court in *Drueding v. Devlin*, 380 U.S. 125 (1965), affirming 234 F. Supp. 721 (D. Md. 1964); to the same effect, see *Hall v. Beals*, 38 U.S.L. Week 4006 (November 24, 1969). The constitutionality of disqualifications of nonresidents and of resident aliens, who of course are fully liable for state taxes and personal exactions, has long been well established in decisions of this Court:

> ". . . [I]n *W.M.C.A. v. Lomenzo*, 377 U.S. 633 . . . we treated an apportionment based upon United States citizen population as presenting problems no different from apportionments using a total population measure. Neither in *Reynolds v. Sims*[2] nor in any other decision has this Court suggested that the states are required to include aliens, transients, short-term or temporary residents or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. . . . The difference between exclusion of all military and military-related personnel, and exclusion of those not meeting a state's residence requirements is a difference between an arbitrary and a constitutionally per-

[2] 377 U.S. 533 (1964).

missible classification." *Burns v. Richardson*, 384 U.S. 73, 91-92 and n. 21 (1966).

The present case involves the application of the Maryland constitutional provision to twelve plaintiffs, all residents on the grounds of the National Institutes of Health. Exclusive jurisdiction over the area on which plaintiffs reside was ceded to the United States in 1953 by Article 96, Section 34 of the Code of Public General Laws of Maryland, Chapter 158 of the Acts of 1953, and was accepted by the United States, the State reserving only the right to serve its civil and criminal process on the reservation. The outstanding treatise on the subject of the rights and obligations of residents of federal enclaves is the two-volume Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States entitled "Jurisdiction Over Federal Areas Within The States", prepared in 1956 and 1957 [hereinafter referred to as "Interdepartmental Committee Report"]. While some of the plaintiffs had previously resided and voted in Maryland outside the federal reservation, none of them claimed an intention to retain his previous residence as a basis for allowance to him of the franchise.[3] None of the affidavits of plaintiffs contained any facts from which retention of a domicile outside the federal reservation could be found.

Ten of the twelve plaintiffs on or about October 18, 1968 were threatened with removal from the voting rolls upon discovery of the fact that they resided outside the State's jurisdiction; two of the plaintiffs were refused registration

[3] The circumstances in which a Maryland resident moving on to a federal reservation may be deemed to have intended to retain his prior residence are outlined in *Walsh v. Crouse*, 194 A. 2d 107 (Md., 1963), making clear that persons residing on federal reservations by legal compulsion do not forfeit their rights at their prior place of residence.

on the same ground, since it has long been established that residents of reservations under the exclusive jurisdiction of the federal government are not residents of Maryland. *Lowe v. Lowe,* 133 Atl. 729 (Md., 1926); *Royer v. Board of Election Supervisors,* 191 A. 2d 446 (Md., 1963), *cert. den.* 375 U.S. 921 (1963); *Tanner v. McKeldin,* No. 17,373 Eq. (Cir. Ct. Frederick Co. 1953); 10 *Opinions of the Attorney General of Maryland* 107 (1925); 11 Id. 120 (1926); 17 Id. 139 (1932); 36 Id. 129 (1951); 46 Id. 114 (1961); 47 Id. 103 (1962).

On October 24, 1968, plaintiffs instituted the present action, praying declaratory and injunctive relief against removal or exclusion from the voting rolls of the named plaintiffs and praying the covening of a three-judge court and the issuance of a temporary restraining order. Pursuant to 28 U.S.C. §2284(a), the Attorney General of Maryland was advised of the filing of the action, and at the request of counsel for the Permanent Board of Registry for Montgomery County conducted the defense of this action. On October 25, 1968, a hearing was conducted by the three-judge court. On October 28, 1968, Chief Judge Thomsen, the District Judge to whom the application for three-judge court and temporary restraining order had been presented, issued, pursuant to 28 U.S.C. §2284(3), a temporary restraining order preserving the status quo by granting temporary relief to the ten plaintiffs who had been inadvertently registered but not to the two who had unsuccessfully sought registration, the Court noting the imminence of the national election on November 5, 1968. The accompanying opinion found, notwithstanding the directly applicable *Royer* case in which this court had denied certiorari only five years earlier, a "paucity of authority" on the point at issue (A. 11).

On January 29, 1969, the three-judge court, following further argument, rendered an opinion expressing the view that Art. I, Section 1 of the Maryland Constitution, as construed in *Royer v. Board of Election Supervisors, supra*, was invalid as applied to the plaintiffs. The opinion, which discussed none of this court's prior holdings relating to the legal status of federal reservations, relied entirely on "implication" (A. 23) from a dictum in *Howard v. Commrs. of Louisville*, 344 U.S. 624 (1953) and on the holding in *Carrington v. Rash*, 380 U.S. 89 (1965), a case not involving federal enclaves at all, in reaching a result which the court conceded was unsupported by and contrary to the directly applicable decisions (A. 19). On February 19, 1969, the court signed an order in the form submitted by plaintiffs granting them the relief prayed. The defendants' prayer that entry of the order be stayed for a period of sixty days to permit the filing of a Notice of Appeal to this court and be stayed thereafter pending decision by this Court was refused, the Court explaining that "[w]e agreed upon [plaintiffs'] form of order so that the plaintiffs would not be prevented from voting this fall if there is a special election". At the time, some nine months prior to November, 1969, no special election had been called; the special election called by the Maryland General Assembly by Chapter 76 of the Acts of 1969, approved April 9, 1969, was found to be unconstitutionally called in *Cohen v. Governor of Maryland*, 255 A. 2d 320 (Md., 1969).

On March 17, 1969, the Attorney General of Maryland and the Members of the Board of Supervisors of Elections of Baltimore City filed a Motion to Intervene as parties defendant in this action pursuant to Rules 24(a)(2) and 24(b)(1) and (2) of the Federal Rules of Civil Procedure.[4]

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[4] By statute, Md. Code Ann., Art. 32A, Sec. 2 (1957), the Attorney General of Maryland is counsel to the Board of Supervisors of Elec-

On April 10, 1969, the Permanent Board of Registry of Montgomery County having consented to intervention and no objection thereto having been filed by plaintiffs, an order was signed by the court granting the requested intervention. On April 14, 1969, the intervenors noted the present appeal. Probable jurisdiction was noted by this Court on October 13, 1969.

ARGUMENT

I.

THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE THAT RESIDENTS OF FEDERAL ENCLAVES, OVER WHICH CONGRESS RETAINS EXCLUSIVE JURISDICTION, BE AFFORDED THE RIGHT TO VOTE IN THE STATE IN WHICH THE ENCLAVE IS SITUATED.

The lower court, in its opinion, recognized that the majority of State court decisions have concluded that residents of Federal enclaves are not residents of the State in which the enclave is situated for voting purposes, stating that (A. 19):

> "[I]t has been held in most of the cases considering the question that where the federal government has exclusive jurisdiction of an enclave, persons residing in such enclave are not state residents for voting purposes."

This principle was first enunciated in *Opinion of the Justices*, 1 Metc. 580 (Mass., 1841), was further developed in oft-cited case of *Sinks v. Reese*, 19 Ohio St. 306 (1869), and has been carried forward in a long line of decisions, the most recent of which was filed less than seven months ago. See *Langdon v. Jaramillo*, 454 P. 2d 269 (N.M., 1969). See also *State ex rel. Wendt v. Smith*, 103 N.E. 2d 822 (Ohio,

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tions of Baltimore City, and the Secretary of State of Maryland. He is not counsel, however, to the Permanent Board of Registry of Montgomery County, or to the Board of Supervisors of Elections of Montgomery County.

1951); *Arledge v. Mabry*, 197 P. 2d 884 (N.M., 1948); *State ex rel. Parker v. Corcoran*, 128 P. 2d 999 (Kan., 1942); *Merrill v. Shearston*, 214 Pac. 540 (Colo., 1923); *State ex rel. Lyle v. Willett*, 97 S.W. 299 (Tenn., 1906); *McMahon v. Polk*, 73 N.W. 77 (S.D., 1897); *In re Town of Highlands*, 22 N.Y. Supp. 137 (1892); *United States v. Cornell*, Fed. Case No. 14,867 (D.R.I., 1819) (Story, J.); see generally cases collected in 34 A.L.R. 2d 1193-1202 (1954). The lower court's opinion is the first and only federal court decision in which a contrary conclusion has been reached.

One of the most recent cases on this subject is *Royer v. Board of Election Supervisors, supra.* Because the *Royer* case clearly enunciates the Maryland law on this subject, it was binding on the lower court in the absence of a violation of the Appellee's rights protected by the United States Constitution. For this reason, the basis for the decision bears close examination.

The case involved certain petitioners who were civilian employees of the United States Government at the Perry Point Veterans' Hospital located within the geographical limits of Cecil County, Maryland. The petitioners also resided there and had no other residence in the county. The tract known as Perry Point was purchased by the United States Government in 1918 and exclusive jurisdiction was ceded by statute by the State of Maryland, the only reservation being the State's right to serve civil and criminal process upon persons found there. The action of the Federal government in assuming exclusive jurisdiction was taken pursuant to Article I, section 8, clause 17 of the United States Constitution which reads, in pertinent part, as follows:

> "[The Congress shall have the power to] exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature

> of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And
>
> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Petitioners sought an order requiring the Board of Election Supervisors of Cecil County to register them as qualified voters in that county.

As did the court below, the Court of Appeals of Maryland carefully examined the "various [federal] statutes waiving or receding to the State's jurisdiction in certain particulars" (see Argument, I.A., *infra*) and the rights, privileges and obligations conferred upon the residents of Federal enclaves by legislative acts of the State of Maryland (see Argument, I.B., *infra*). Upon concluding its discussion of these points, the Court stated (at page 449):

> "But in any event, the mere fact that the United States Government has seen fit to yield, for the time being and for reasons of policy, some of its exclusive rights to the States, does not, we think, amount to a general grant of concurrent jurisdiction. Nor does it compel the States to afford voting privileges. . . . Nor do we find in the latest case on the subject, Paul v. United States, 371 U.S. 245, 83 S. Ct. 426, 9 L. Ed. 2d 292, any intimation that the Fourteenth Amendment will be extended to cover residents of Federal enclaves, where the matter has traditionally been left to adjustment between the Federal and State legislative bodies. . . .
>
> * * *
>
> "The appellants' constitutional argument seems to be based, not upon a claim of equal protection but on a claim of 'taxation without representation.' This colonial slogan is not found in our State Constitution, or

> in the Federal Constitution, and the principle is not without exception. See Thomas v. Gay, 169 U.S. 264, 276, 18 S. Ct. 340, 42 L. Ed. 740. . . .
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> * * *
>
> "If a change is desirable . . ., we think it should be through adjustment by the sovereign legislative bodies and not imposed by the courts."

Despite this background, the lower court nonetheless reached a conclusion poles apart from that of the *Royer* court (A. 25):

> "We conclude that on balance the plaintiffs here are treated by the State of Maryland as state residents to such an extent that it is a violation of the Fourteenth Amendment for the State to deny them the right to vote."

In support of this holding the lower court relied upon the "similar reasoning" of the three state cases which, standing alone, represent the minority view on this point [*Arapajolu v. McMenamin,* 249 P. 2d 318 (Calif. D. Ct. App., 1st D., 1952); *Adams v. Londeree,* 83 S.E. 2d 127 (W. Va., 1954); and *Rothfels v. Southworth,* 356 P. 2d 612 (Utah, 1960)]. These very cases were considered by the Court of Appeals of Maryland in *Royer* and were aptly disposed of with the following language (from page 449 of that opinion):

> "The appellants rely upon three recent cases [references and citations omitted]. The Arapajolu case was decided by an intermediate court, and the case was denied review by the Supreme Court of California, three judges dissenting. The decision turned on the court's construction of the local statute . . . In both the Rothfels and Adams cases there were powerful dissents, and the decisions were rested on the local statutes *and the fact that the state had reserved concurrent jurisdiction.* We think these cases are readily distinguishable and not persuasive." (emphasis supplied.)

Thus, in reaching its conclusion that the Fourteenth Amendment requires that residents of Federal enclaves be entitled to vote in state and local elections, the lower court overrode a decision reached less than six years earlier by the Court of Appeals of Maryland, which decision was denied review by the United States Supreme Court shortly thereafter.

There are basically two underpinnings upon which this action of the lower court rests; namely that

1. The exclusive jurisdiction formerly exercised by the Congress over Federal enclaves has been eroded through successive retrocessions of legislative authority to the States so that the result is that exclusive jurisdiction no longer remains in the United States Government.
2. The incidence of state citizenship conferred upon residents of Federal enclaves by the Maryland Legislature requires that the State of Maryland treat these persons as State residents for voting purposes.

Both of these principles must be carefully scrutinized by this Honorable Court.

A. *The Legislative Retrocessions by Congress Do Not In Any Way Limit the Continuing Exclusive Federal Jurisdiction Over These Areas.*

The court below conceded that "exclusive jurisdiction" over the lands of the National Institutes of Health was ceded to the United States by virtue of Article 96, Sections 31, 34, 36 and 37 of the Maryland Code (A. 20-21). Indeed, if there could be any doubt on this point, it is laid to rest by the *Inventory Report of Jurisdictional Status of Federal Areas Within the States — Maryland* (General Services Administration, 1962) which lists (at p. 343) the National

Institutes of Health under its "jurisdictional code" as *exclusive*. To the same effect, see *Interdepartmental Committee Report*, Part I, p. 105.

The court found, however, "that the concept of exclusive federal jurisdiction over reservations such as the one here involved has been drastically altered within the past 40 years" (A. 22), citing eight statutes enacted by Congress between 1928 and 1950, six of which[5] retroceded certain civil and criminal jurisdiction to the states and two of which[6] authorized the extension by the states of the benefits of certain remedial legislation to residents of federal enclaves. The Appellants readily admit that sporadic Congressional action has taken place but urge that in no way can this be said to alter the *exclusive* jurisdiction of the United States over these areas.

It is axiomatic that there are "four categories of legislative jurisdictional situations (in which the United States

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[5] State tax permitted upon gasoline and other motor vehicle fuels sold on federal enclaves (4 U.S.C. § 104 (1936), known as the Lea Act); States permitted to enforce unemployment insurance law on federal enclaves (26 U.S.C. § 3305(d) (1939)); States permitted to levy and collect sales, use and income taxes within federal enclaves (4 U.S.C. §§ 105-110 (1940), known as the Buck Act); States permitted to tax a lessee's interest in real estate leased by the federal government in an enclave (10 U.S.C. § 2667(e) (1947), known as the Military Leasing Act); State criminal law in effect at time of act or omission controls on federal enclaves (18 U.S.C. § 13 (1948), amendment to Assimilative Crimes Act of 1825); payments to local areas whose educational systems are "impacted" by children of residents of federal reservations (20 U.S.C. § 236(2) (1950)).

This last statute was incorrectly included by the court below in its list of retrocessions. The Act (20 U.S.C. §§ 236-241-1) is very broad, reaching also "agencies [providing] education for children whose parents are *employed* on Federal property." (emphasis supplied.) Furthermore, it expands neither the rights nor obligations of enclave residents.

[6] State wrongful death statutes available to residents of federal enclaves (16 U.S.C. § 457 (1928)); State workmen's compensation law extended to federal enclaves (40 U.S.C. § 290 (1936)).

has (a) exclusive, (b) concurrent, (c) or partial legislative jurisdiction, or (d) a proprietorial interest only)" and it is clear that

> "[W]hen the Federal Government receives exclusive legislative jurisdiction over an area, the jurisdiction of the State . . . is ousted, subject only to the right to serve process and to the several concessions made by the Federal Government which have already been mentioned [see footnotes 5 and 6, *supra*]. Thereafter only Congress has authority to legislate for the area.
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> * * *
>
> "Federal areas of exclusive jurisdiction are considered in many respects to comprise legal entities separate from the surrounding State, and, indeed, until a recent decision of the United States Supreme Court dispelled the notion [*Howard v. Commissioners of Louisville*, *supra*, discussed *infra*], were viewed as completely sovereign areas (under the sovereignty of the United States), geographically surrounded by another sovereign. As a result, there is no obligation on the State . . . to provide for such areas normal governmental services. . . ." (emphasis supplied). *Interdepartmental Committee Report*, Part I, pp. 15 and 17.

This definitive Report, written six years after passage of the most recent of the retrocession statutes, recognizes that federal legislative jurisdiction remains exclusive in these areas. Indeed, the Buck Act itself (identified by the lower court (A. 21) as the "most extensive and far reaching retrocession statute enacted by Congress") expressly recites that

> ". . . the provisions of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any federal area over which it would otherwise have exclusive jurisdiction or to the limit the jurisdiction over any federal area." 4 U.S.C. § 108.

Seeking further support for its theory of the transcendental nature of federal enclaves, the lower court relied upon the decision of this Court in *Howard v. Commissioners of Louisville, supra.* The *Howard* case (never subsequently cited by this Court) held merely that a state legislature could alter the boundaries of subdivisions to include a federal reservation in an incorporated rather than an unincorporated area for tax purposes. The City of Louisville annexed into its city limits certain territory, including a Naval Ordnance Plant tract, and then assessed its 1% local income tax upon the wages of plant employees, pursuant to the express provisions of the Buck Act (4 U.S.C. § 106). This Court (at p. 627) found that

> "Kentucky's consent to [federal] acquisition gave the United States power to exercise exclusive jurisdiction within the area. A change of municipal boundaries did not interfere in the least with this jurisdiction of the United States within the area or with its use or disposition of the property.
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> * * *
>
> "Even though the Ordnance Plant is within the boundaries of the City of Louisville pursuant to the annexation, exclusive jurisdiction over the area still remains with the United States, except as modified by statute. [citations omitted.]"

Furthermore, the *Interdepartmental Committee Report,* Part II, p. 248, recognizes that ". . . the *Howard* decision immediately related to a State's rights over individuals in Federal enclaves *rather than to individual's rights to privileges under the State law.*" (emphasis supplied.) See also *Mississippi River Fuel Corporation v. Cocreham,* 382 F. 2d 929 (5th Cir., 1967) at p. 938 (footnote 17):

> ". . . By holding that the State of Kentucky and its political subdivisions retained control over their own geographic boundaries *Howard* did not therefore imply that a state has legislative power within a federal

enclave unless exercise of that power interferes with the federal government. The Supreme Court upheld the city's power to tax only because of express congressional authorization: The Court recognized that Congress alone had political control within the federal area."

The fallacy underlying the lower court's position, that exclusive federal jurisdiction over enclaves has somehow been eroded by retrocession statutes and court decisions, is focused upon in the following incisive excerpt from Sewell, "The Federal Enclave", 33 *U. Tenn. L. Rev.* 283, 307-08 (1966):

"... It makes sense to contend that the Federal statutes in question evidence a clear intention that the United States regards the areas in question as remaining within the States. But it is quite another matter to take the unnecessary step of suggesting an inference from these statutes that basic legislative jurisdiction has been surrendered to the States. The courts using this form of reasoning have done so for the purpose of expanding the permissive realm of State legislative authority to matters not covered by the statutes. *It would appear that, if any inference at all with respect to the matter is warranted, the absence of a Federal permissive statute with respect to a particular subject would indicate an intention to preclude the State from exercising legislative authority in that respect.*

* * *

"A final point should be made, and this is the most telling. Exclusive Federal jurisdiction has reference to the exclusive authority to legislate, rather than to the actual state of substantive law in effect on enclaves. *Permissive statutes of the type in question constitute an exercise of the Federal legislative power. They do not surrender jurisdiction but merely permit State law, in some instances, to extend on Federal areas.* As an illustration of this point, it should be recognized that the United States may, at any time, repeal the

> statutes in question and discontinue the application of State laws. If jurisdiction had actually been surrendered, it would not be possible for the United States to recapture it in this manner." (emphasis supplied.)

Finally, the decision of this Court in *Offutt Housing Company v. Sarpy*, 351 U.S. 253 (1956), decided three years after *Howard*, entirely undercuts the position of the lower court on this point. In upholding Nebraska's right to assess personal property taxes (by virtue of 10 U.S.C. § 2667(e), see footnote 5, *supra*) against land on an air force base leased to a private corporation, the Court stated (at pp. 260-261) that:

> ". . . we have concluded that [by statute] the States were to be permitted to tax private interests, like those of this petitioner, in housing projects located on areas subject to the federal power of 'exclusive legislation.' We do not hold that Congress has relinquished this power over these areas. We hold only that Congress, in the exercise of this power, has permitted such state taxation as is involved in the present case."

Despite Congressional action, the conclusion is hence inescapable that exclusive federal jurisdiction over the National Institutes of Health and similarly situated enclaves remains unimpaired and unencumbered.

B. *The Limited Legislative Activity of the State of Maryland, With Respect To Residents of Federal Enclaves Within the State, Does Not Require the State To Extend Voting Rights To These Residents.*

It has already been seen that Congress' "several concessions", expanding certain rights and obligations of residents of federal enclaves, have not undercut pre-existing exclusive federal jurisdiction over these areas. The lower court sought to buttress its opinion (in a shift from the federal to state level) by emphasizing (A. 22) that the

"Maryland legislature . . . has conferred other benefits of State citizenship on such individuals [citing three isolated examples]."[7] The court's theory (A. 25) is that:

> ". . . on balance the plaintiffs here are treated by the State of Maryland as state residents to such an extent that it is a violation of the Fourteenth Amendment for the State to deny them the right to vote."

This theory merits careful scrutiny.

There can be no doubt that a transfer of exclusive jurisdiction from state to federal sovereignty works hardships upon enclave residents in many instances. This is best summarized in the *Interdepartmental Committee Report*, Part II, p. 215:

> "EFFECTS OF TRANSFERS OF LEGISLATIVE JURISDICTION: *In general.* — With the transfer of sovereignty, which is implicit in the transfer of exclusive legislative jurisdiction, from a State to the Federal Government, the latter succeeds to all the authority formerly held by the State with respect to persons within the area as to which jurisdiction was transferred, and such persons are relieved of all their obligations to the State. . . . And transfer of legislative jurisdiction from a State to the Federal Government has been held to affect the *rights* or *privileges*, as well as the *obligations*, of persons under State law. Specifically, it has been held to affect the rights of residents of areas over which jurisdiction has been transferred to receive an education in the public schools, to vote and hold public office, to sue for a divorce, and to have their persons, property, or affairs subjected to the probate or lunacy jurisdiction of State courts; it has also been interpreted as affecting the right of such residents to receive various other miscellaneous services ordinarily rendered by or under the authority of the State."

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[7] Divorce and annulment proceedings (Article 16 § 23 of the Maryland Code, added by Chapter 225 of the Laws of Maryland of 1927); adoption proceedings (Article 16 § 69 of the Maryland Code, added by Chapter 599 of the Laws of Maryland of 1947); access to public schools.

Maryland has recognized these inequities and has provided legislative solutions[8] to some, if not all, of them (divorce and annulment, adoption and public education). With specific reference to voting, Maryland has also attempted on several occasions to remove the apparent inequity. See testimony of the Honorable Thomas B. Finan, Attorney General of Maryland, reported in "Adjustment of Legislative Jurisdiction on Federal Enclaves", *Hearings Before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations of the United States Senate* (88th Congress, First Session, 1963), pp. 121-30 [hereinafter referred to as "Hearings"]. More recently, the proposed Maryland Constitution, adopted by the Constitutional Convention of Maryland on January 10, 1968, contained the following language:

> "2.04 VOTERS IN UNITED STATES ENCLAVES
>
> A person shall not be deemed ineligible to vote in any election solely by reason of the fact that he resides on land over which the United States has been ceded jurisdiction."

This document failed of ratification at a special election held on May 14, 1968.

These efforts have been made despite the fact that "there is no obligation on the State" to do so and that residents of federal enclaves are relieved of many of the obligations of state citizenship. The extent of these escaped obligations (discussed in detail in the *Interdepartmental Committee Report*, Part II, pp. 177-188) includes freedom from real estate, severance,[9] personal property,[10] and other

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[8] Others may be resolved by the rule enunciated by this Court in *Chicago, Rock Island & Pacific Ry. v. McGlinn*, 114 U.S. 542 (1885), that residents of federal enclaves may claim the benefit of state legislation in effect at the time of transfer of exclusive jurisdiction. See generally *Interdepartmental Committee Report*, Part II, pp. 145-163.

[9] *Mississippi River Fuel Corporation v. Cocreham, supra.*

[10] *Humble Pipe Line Co. v. Waggonner*, 376 U.S. 369 (1964).

state taxes (except those authorized by the Buck Act and the Military Leasing Act); freedom from state regulatory and licensing legislation; freedom from service in the militia; freedom from compulsory education laws; and freedom from jury service.

Reduced to its simplest terms, the lower court's view is that if Maryland is to dispense generosity, it must dispense *absolute* generosity — that by exercising retroceded legislative jurisdiction and by offering the benefits of a few pieces of civil legislation, Maryland has unwittingly relinquished its right to withhold from residents of federal enclaves the elective franchise. The unprecedented nature of this theory is best and most vividly demonstrated by the total absence of authority cited for it by the lower court.

The decision in *Carrington v. Rash, supra,* was loosely alluded to (A. 25) but is neither controlling nor persuasive. There, the provision in the Texas Constitution that servicemen, during their tour of duty, whether or not residents of federal enclaves, could not vote in state elections was found to be invidiously discriminatory and, hence, violative of the Fourteenth Amendment. The rationale of *Carrington* simply is that the right to vote may not "casually" be withheld from one merely because of the nature of his current employment. The Appellants entirely agree. Cf. *Kramer v. Union Free School District No. 15,* 37 U.S. L.Week 4530 (June 16, 1969); *Cipriano v. City of Houma,* 37 U.S. L.Week 4598 (June 16, 1969).

Residents of federal enclaves are free from many of the *obligations* of state citizenship. Maryland has done more than most states in securing for them some of the attendant *rights.* This combination of circumstances does not somehow create a wellspring from which voting rights are made to flow by judicial fiat.

The lower court's decision creates a federal cause of action where none previously existed and accomplishes this *tour de force* without the benefit of either apposite or analogous case law. Furthermore, it has been seen that the two theories upon which the decision is based are unsound.

II.

ADJUSTMENT OF THE VOTING STATUS OF RESIDENTS OF FEDERAL ENCLAVES IS PROPERLY A MATTER FOR LEGISLATIVE RATHER THAN JUDICIAL ACTION.

If the decision of the lower Court were to be upheld by this Court, the result would be that all residents of Federal enclaves able to meet the age and the period of residency requirements of the applicable State laws, would immediately become entitled to vote in elections held in the State in which the enclave is located. Those most familiar with the jurisdictional problems attendant to Federal enclaves recommend a far less drastic, but equally effective, solution to the problem. The Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States, after sixteen months of exhaustive inquiry into these problems, reached some of the following conclusions:

> "It is clear that the legislative jurisdictional status of many Federal installations and areas is in need of major and immediate adjustment to bring about the more efficient management of the Federal operations carried out thereon, the furthering of sound Federal-State relations, *the clarification of the rights of the persons residing in such areas* and the legalization of many acts occurring on these installations and areas which are currently of an extra-legal nature. Many adjustments can be accomplished unilaterally by Federal officials within the framework of existing statutory and administrative authority by changing certain of their existing practices and policies. Others

may be capable of accomplishment by cooperative action on the part of the appropriate Federal and State officials."

* * *

"The most immediate need, in the view of the Committee, is to make provision for the retrocession of unnecessary jurisdiction to the States. A number of Federal agencies, as well as a significant proportion of the responding State attorneys general, have made recommendations along this line. The Committee heartily concurs in these recommendations."

* * *

"It is the belief of the Committee that the need for the Federal and State legislation which [it] has recommended is demonstrated by its study and in this report. With the enactment of such legislation, and with the revision by Federal agencies of their policies and practices relating to the acquisition or retention of legislative jurisdiction so that they are in conformity with the recommendations made in the report, the Committee is confident that most of the problems presently arising out of this subject could be resolved, to the great benefit of the Federal Government, the States and local governmental entities, residents of Federal areas, and the many others who are affected." (emphasis supplied.) *Interdepartmental Committee Report*, Part I, pp. 70-71, 71-72 and 79.

On August 11, 1956, less than five months after its Report was presented, Senate Bill 4196 was introduced into the 84th Congress at the request of the President of the United States, with the sponsorship of the Interdepartmental Committee. The Bill was not passed, but was re-introduced in identical form at subsequent sessions, receiving its most careful study as Senate Bill 815 of the 88th Congress. This Bill read, in pertinent part, as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Con-

gress assembled. That (a) with respect to federally owned or operated land areas in the several States, the Congress finds that the retention by, or relinquishment to, the States of legislative jurisdiction of the kind involved in article I, section 8, clause 17, of the Constitution of the United States, (1) *enables States and local communities to obtain tax revenues from persons, private property, and business transactions within such area, if not otherwise exempt;* (2) relieves the Federal Government in many respects from the performance of functions normally exercised by the States and local communities; and (3) *provides a basis for assuring to the residents of such areas many rights, privileges, and services which they would normally enjoy when the Federal Government does not have exclusive jurisdiction over such areas.*

(b) It is hereby declared to be the policy of the Congress that—

(1) the Federal Government shall receive or retain only such measure of legislative jurisdiction over federally owned or operated land areas within the States as may in particular cases be necessary for the proper performance of such of its functions as are performed upon such areas; and

(2) to the extent consistent with the purposes for which the land is held by the United States the Federal Government shall avoid receiving or retaining concurrent legislative jurisdiction or any measure of exclusive legislative jurisdiction.

Sec. 2. Notwithstanding any other provision of law, the obtaining or retaining of exclusive jurisdiction or other measure of legislative jurisdiction by the United States over lands or interest therein which have been or shall hereafter be acquired by it shall not be required. The head or other authorized officer of any department or independent establishment or agency of the Government may consistent with the policy set forth in this Act, acquire from, or relinquish to, the State in which any lands or interests therein under

his immediate jurisdiction, custody, or control are situated, such measure of legislative jurisdiction over such lands or interests as he may deem desirable. . . ." (emphasis supplied).

As is apparent from the text of the Bill, it would have adopted a policy that only *necessary* Federal jurisdiction be retained and would have authorized the heads of government agencies to acquire or cede such jurisdiction as they saw fit.

Because the Bill was actively opposed by the National Association for the Advancement of Colored People (see *Hearings*, pp. 140-170) (although supported by the President and Attorney General of the United States, a majority of the State governors and attorneys general[11] and the American Civil Liberties Union), it was never enacted into law. For a general discussion of this Bill see Strass, "Federal Enclaves — Through the Looking Glass — Darkly," *15 Syr. L. Rev.* 754 (1964). Passage of Senate Bill 815 would have provided a vehicle by which the multitude of Federal-State jurisdictional problems with respect to Federal enclaves could have been resolved.

Such broad-based congressional action is not necessary, however, to provide the relief sought by the Appellees in this case. On a number of occasions Congress has retroceded jurisdiction over certain enclaves in order to permit the residents of that enclave to vote in the State in which the enclave is situated.[12] There are currently two bills

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[11] Including the Honorable Thomas B. Finan, Attorney General of Maryland, who testified in favor of the Bill. See *Hearings*, pp. 121 *et seq.*

[12] Fort Lyon Veterans Hospital reservation, Las Animas, Colorado (Public Law 89-626, approved 1966) (see Report of Committee on Veterans' Affairs of the House of Representatives, attached to this Brief as Exhibit A); Atomic Energy Commission reservation, Sandia, New Mexico (68 Stat. 961, approved 1954); Atomic Energy Commission reservation, Los Alamos, New Mexico (63 Stat. 11, approved

pending in Congress which would specifically retrocede jurisdiction to permit voting at certain military bases, upon acceptance of the retrocession by the states involved.[13] Also, as an outgrowth of the recommendations of the Intergovernmental Committee Report and the theories expressed in Senate Bills 4196 and 815, already discussed, certain Federal agencies[14] are seeking to obtain for department heads the right to relinquish unneeded jurisdiction, which retrocession would almost certainly include voting rights.

The State of Maryland would support any congressional action which would put the residents of Federal enclaves upon an equal footing with residents of the State generally. It believes that the recommendations of the Intergovernmental Committee Report, quoted above, represent the most responsible and appropriate manner in which this result may be accomplished. But the relief sought by the Appellees could be achieved through either general or specific retrocessions by Congress.

In conclusion, the Appellants urge that there is considerable logic and force to the dictum in *Royer v. Board of Election Supervisiors, supra* at p. 449:

> "If a change [in the voting status of enclave residents] is desirable . . ., we think it should be through adjustment by the sovereign legislative bodies and not imposed by the courts."

1949); Disabled Soldiers' Home, Kansas (31 Stat. 1175, approved 1901); Disabled Soldiers' Home, Ind. and Ill. (30 Stat. 668, approved 1898); Disabled Soldiers' Home, Ohio (16 Stat. 399, approved 1871); Alexandria County (formerly a portion of the original District of Columbia) (9 Stat. 35, approved 1846).

[13] S. 2949, introduced September 23, 1969, by Senator Muskie, relating to Dow Air Force Base, Maine; H.R. 346, introduced January 3, 1969, by Congressman Scott, relating to Dahlgren Naval Weapons Laboratory, Virginia.

[14] H.R. 13301, introduced August 4, 1969, by Congressman Teague with respect to the Administrator of Veterans' Affairs.

CONCLUSION

An examination of the theories put forth by the lower court to support its opinion establishes that exclusive federal jurisdiction remains intact over the enclaves in question (despite certain isolated retrocessions) and that the State of Maryland exercises only insignificant legislative jurisdiction in these areas. Thus, it cannot be said that residents of these areas must be afforded voting privileges in order to avoid a violation of the Fourteenth Amendment. A contrary decision would be inherently unfair to the states because it would permit persons to vote who are neither liable for many local taxes nor in many instances are subject to the authority of the very persons for whom they may vote. Such a decision should not be entered into hastily and should be the result of legislative rather than judicial deliberation. If the careful balance between rights and responsibilities of residents of federal enclaves is to be altered, it should be the result of a carefully drawn legislative enactment such as the one proposed by the Interdepartmental Committee.

Respectfully submitted,

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December 4, 1969.

PROOF OF SERVICE

I HEREBY CERTIFY that on this 3rd day of December, 1969, I mailed by first class mail, postage prepaid, a copy of the Brief of the Appellants, to Richard F. Schifter, Esquire, Strasser, Spiegelberg, Fried, Frank & Kampelman, 1700 K Street, N.W., Washington, D.C. 20006, Attorney for the Appellees.

HENRY R. LORD,

Assistant Attorney General
of Maryland.

EXHIBIT A

89TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 1505

RETROCEDING TO THE STATE OF COLORADO JURISDICTION OVER THE FORT LYON VETERANS HOSPITAL

MAY 10, 1966.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. TEAGUE of Texas, from the Committee on Veterans' Affairs, submitted the following

REPORT

[To accompany H.R. 12664]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 12664) to retrocede to the State of Colorado exclusive jurisdiction held by the United States over the real property comprising the Fort Lyon Veterans Hospital, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

On line 6, strike out "Lyons" and insert "Lyon".

On line 6, insert "reservation" after the word "Hospital".

Amend the title so as to read:

A bill to retrocede to the State of Colorado exclusive jurisdiction held by the United States over the real property comprising the Fort Lyon Veterans Hospital reservation.

EXPLANATION OF THE BILL

Simply stated, the purpose of this bill is to facilitate the opportunity to vote of residents of the Fort Lyon, Colo., Veterans' Administration reservation by retroceding to Colorado exclusive jurisdiction over the reservation.

The Fort Lyon Veterans Hospital is located in Bent County in Colorado, near the city of Las Animas. It is on a 618.2-acre Federal installation with approximately 1,150 persons of whom approximately 125 are resident employees of the Veterans' Administration. The United States has exclusive jurisdiction over the reservation, except for the service of civil and criminal processes.

The Department of Justice has advocated general legislation to take care of cases such as this. Places over which the United States has exclusive jurisdiction are not considered part of the State in which they are physically located. Only the States of California, West Virginia, Utah, and Nevada permit residents of such areas to qualify as voters. Since there is no general law on this subject, the Department of Justice and the Veterans' Administration have no objections to the enactment of this specific proposal.

There will be no additional expenditure of public funds as the result of enactment of this proposal.

The favorable reports of the Department of Justice and the Veterans' Administration follow:

MAY 5, 1966.

Hon. OLIN E. TEAGUE,
Chairman, Committee on Veterans' Affairs,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on H.R. 12664, 89th Congress, a bill to retrocede to the State of Colorado exclusive jurisdiction held by the United States over the real property comprising the Fort Lyons Veterans Hospital.

The Fort Lyons Veterans Hospital, which is located in Bent County, Colo., near the city of Las Animas, is a 618.2-acre Federal installation with a population of approximately 900 persons, of whom a substantial number (occupying 60 family quarters and 21 other residential quarters) are indicated to be resident employees of the Veterans' Administration or their families, and the rest to be patients.

The United States has exclusive jurisdiction over the site of this installation, just as it has over the District of Columbia. For many purposes places over which the United States has such jurisdiction freqently are not considered a part of the State in which they are physically located. This is true as to voting: only the States of California, West Virginia, Utah, and Nevada generally permit residents of such areas to qualify as voters. It is understood that the present bill is occasioned by a desire upon the part of some 125 residents of the Fort Lyons installation to vote.

A 2-year study by an interdepartmental committee of the subject of jurisdiction over Federal areas within the States led to conclusion, reported in 1956 and 1957 ("Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States": Pt. I: The Facts and Committee Recommendations (1956); Pt. II: A Text of the Law of Legislative Jurisdiction (1957)), that with respect to the large bulk of federally owned or operated real property in the several States it is desirable that the Federal Government not receive, or retain, any measure of jurisdiction whatever, but that it hold the installations and areas in a proprietorial status only. In the past 10 years Federal agencies have accepted jurisdiction over their properties only in rare circumstances, and the United States has jurisdiction with respect to only less than 5 percent of its real property. Nevertheless, it continues to have jurisdiction over approximately 5,000 individual properties, on which approximately 1 million persons are indicated to live. While Federal agencies are authorized by

statute to accept jurisdiction (see 40 U.S.C. 255), they are not authorized to relinquish jurisdiction which the United States already has. General legislation to authorize relinquishment, H.R. 10613 in the 89th Congress, has been pending for some years.

The Department of Justice has consistently advocated the enactment of the general legislation referred to above. However, it is extremely sensitive to the desire to vote of Federal employees and their families required to live on Federal installations as in the case of persons at the Fort Lyons Veterans Hospital. Consequently, in the absence of general legislation the Department has no objection to enactment of this legislation (H.R. 12664).

In *Kemp* v. *Heebner* (77 Colo. 177, 234 P. 1068), it was indicated that in Colorado a Federal employee could not acquire a domicile, and therefore Colorado voting rights, by virtue of residence on any Federal installation, without reference to its jurisdictional status. The exclusive Federal jurisdiction at the Fort Lyons Veterans Hospital might well in any event be eliminated as a different and positive basis for disqualification as voters of Colorado domiciliaries resident there, for such other benefits as thereby might be derived by residents not Colorado domiciliaries, and on the possibility that Colorado courts would now take a different view than in this 1925 decision.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

RAMSEY CLARK,
Deputy Attorney General.

VETERANS' ADMINISTRATION,
OFFICE OF THE ADMINISTRATOR OF VETERANS' AFFAIRS,
Washington, D.C., May 5, 1966.

HON. OLIN E. TEAGUE,
Chairman, Committee on Veterans' Affairs,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for a report on H.R. 12664, 89th Congress.

The bill would retrocede to the State of Colorado the exclusive jurisdiction of the United States over the Veterans' Administration hospital reservation, Fort Lyon (not Lyons as set forth in the title and in line 6 of the bill), Colo. The retrocession would be effective upon acceptance by the State of Colorado.

The lands comprising the reservation of the Veterans' Administration hospital at Fort Lyon are a part of the former Fort Lyon military reservation. Exclusive jurisdiction over this land, except for the service of civil and criminal processes of the State courts, was ceded to the United States by the State of Colorado (Colorado Rev. Stat. Secs. 143–1–19 to 143–1–21).

We understand that the primary objective of the bill is to enable resident employees of our hospital reservation at Fort Lyon to vote. As the qualifications for voting are prescribed by State law, the question of whether enactment and subsequent acceptance of retrocession by the State would accomplish such purpose is one for resolution by appropriate State officials. We note in this connection the decision of the Supreme Court of Colorado in the case of *Kemp* v. *Heebner*

(77 Colo. 177, 234 P. 1068), relating to the rights of certain resident employees of the U.S. Government's Fitzsimons General Hospital. In that case the court held that even if it was conceded that all the powers of sovereignty concerning the Federal land in question were still vested in the State, the resident employees of the hospital, under the State constitution and controlling statutes, could not acquire, on the hospital grounds, a residence such as is required in order to vote.

Irrespective of whether the employees at Fort Lyon are permitted to vote as a result of enactment of H.R. 12664, it appears that such enactment could subject them to other State laws of general application, such as those relating to taxes and law enforcement.

For your information, the Department of Justice has submitted general legislation to the Congress dealing with the adjustment of the legislative jurisdiction exercised by the United States over land in the several States. The House bill, H.R. 10613, is pending before the Committee on Government Operations. It is designed to provide a basis for assuring residents of Federal areas many rights, privileges, and services which they would not otherwise enjoy.

Our primary concern with H.R. 12664 is whether its enactment would interfere with the effective operation of our hospital at Fort Lyon. It does not appear that the proposed retrocession of exclusive jurisdiction to the State of Colorado would have any such adverse effect. Accordingly, the Veterans' Administration would not object to the favorable consideration of H.R. 12664 by your committee.

The Bureau of the Budget advises that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely,

W. J. DRIVER, *Administrator.*

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 236

WILLIAM EVANS, MEMBER OF THE BOARD OF SUPERVISORS OF ELECTIONS OF BALTIMORE CITY, ET AL., APPELLANTS

v.

TILLYE CORNMAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the three-judge district court (A. 17–26) is reported at 295 F. Supp. 654.

JURISDICTION

Appellees brought suit against certain local election officials under 28 U.S.C. 1343, 1357, 2201 and 2202 and 42 U.S.C. 1983 and 1988, challenging the validity of Article I, Section 1 of the Constitution of the State of Maryland as authoritatively construed by the Maryland Court of Appeals. A district court of three judges, convened pursuant to 28 U.S.C. 2281, decided

in favor of appellees and on February 19, 1969, enjoined the enforcement of the State constitutional provision against appellees. On March 17, 1969, the Attorney General of Maryland and members of the Board of Supervisors of Elections of Baltimore City filed a motion to intervene as parties defendant, which motion was granted on April 10, 1969, with the consent of the defendants and with no objection from appellees (A. 28). The instant appeal resulted. Appellants' notice of appeal to this Court was filed on April 14, 1969, and the Court noted probable jurisdiction on October 13, 1969. The Court's jurisdiction of this appeal rests on 28 U.S.C. 1253.

QUESTION PRESENTED

Whether, consistent with the Equal Protection Clause, the residents of a federal reservation located within the geographical boundaries of a State, who are subject to taxation and other substantial regulation of their activities by the State and its political subdivisions, can be deprived of the right to vote in federal, State and local elections because the federal government still exercises some jurisdiction over the land on which they live.

STATEMENT

Appellees reside on the grounds of the National Institutes of Health, a federal reservation located within the geographical boundaries of Montgomery County in the State of Maryland.

On October 19, 1968, ten of the appellees, registered voters within Montgomery County in the State of

Maryland, were advised by the Permanent Board of Registry of Montgomery County that their names would be removed from the county's voting rolls because they did not qualify as voters in Maryland under Article I, Section 1, of the Maryland Constitution,[1] since they lived on federal property. The two other appellees attempted to register to vote during 1968, but were not permitted to do so for the same reason.

Contending that the application of Article I, Section 1, of the Maryland Constitution, as interpreted by the Maryland Court of Appeals in *Royer* v. *Board of Election Supervisors,* 231 Md. 561, 191 A. 2d 446, certiorari denied, 375 U.S. 921, violated the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution, appellees brought suit in the United States District Court for the District of Maryland, seeking both declaratory and injunctive relief. They asked the court to prohibit the individual members of the Montgomery County Board of Registry from removing the names of the ten registered appellees and to compel the registration of the two appellees seeking registration for the first time. The defendants claimed that the previously registered appellees' names should be removed from the voting rolls and that all of them should be excluded from voting because of the exclusive jurisdiction of the federal government over the grounds of the National Institutes of Health where they resided.

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[1] In relevant part, this provision limits the right to vote in State and local elections to "citizen[s] of the United States * * * who [have] been resident[s] of the State for one year, and of * * * the county * * * for six months next preceding the election" (see J.S. 3–4).

On October 28, 1969, the district court, pursuant to 28 U.S.C. 2284(3), issued a temporary restraining order preserving the status quo by allowing the ten previously registered appellees to remain on the voting rolls, but refusing to grant the two remaining persons the right to register, noting the imminence of the national election of November 5, 1968 (A. 12). In entering this order the district court stated that "[t]he case presents a grave constitutional question, on which there appears to be a paucity of authority" (A. 11).

On January 29, 1969, the three-judge district court held that Article I, Section 1, of the Maryland Constitution, as construed in the *Royer* case, was invalid as applied to appellees in that it denied them equal protection of the laws. It stated the issue involved as "whether Maryland has undertaken to impose on residents of this federal enclave obligations and duties of State citizenship to such a degree that it would amount to unconstitutional discrimination if the right to vote were not likewise granted," in view of the substantial retrocession of jurisdiction by the federal government to the State over the area concerned (A. 20). Determining from a survey of pertinent State and federal legislation that "the concept of exclusive federal jurisdiction over reservations such as the one here involved has been drastically altered within the past 40 years" and that "[t]he rationale of the earlier decisions denying the right to vote to a resident of a federal enclave has been undercut by the various retrocessions by

Congress of its otherwise exclusive jurisdiction" (A. 22, 23), the court concluded that "on balance the plaintiffs here are treated by the State of Maryland as state residents to such an extent that it is a violation of the Fourteenth Amendment for the State to deny them the right to vote" (A. 25). This is so, the court stated, because "the incidents of jurisdiction exercised by Maryland over these plaintiffs are sufficiently weighty that the important right claimed cannot be constitutionally denied" (A. 25–26). It concluded: "A state may not subject an individual who resides within its geographical boundaries to substantial obligations of citizenship and at the same time deny such individual the correlative right to exercise a voice in defining the nature and extent of such obligations" (A. 25).

The court's order granting appellees relief was issued on February 19, 1969, and the Attorney General of Maryland and members of the Board of Supervisors of Elections of Baltimore City subsequently filed a motion to intervene as parties defendant. The district court, with the consent of the defendents (who had indicated an intention not to appeal), and with no objection interposed by the appellees, granted the motion to intervene. A direct appeal to this Court followed.

In its order noting probable jurisdiction, the Court invited the Solicitor General to express the views of the United States.

ARGUMENT

INTRODUCTION AND SUMMARY

Appellants' argument is grounded on the premise that the federal government exercises exclusive jurisdiction[2] over the territory here in question, pursuant to Art. I, Sec. 8, Cl. 17, of the federal Constitution. Thus, the initial question is whether such exclusive jurisdiction does in fact exist here. In our view, the district court correctely concluded that that question must be answered negatively.

While appellants point to a number of minor obligations that bind other State residents but from which persons living in the federal enclave are excused,[3] the only significant obligation mentioned is liability for

[2] Earlier cases in State courts held that where the federal government has "exclusive jurisdiction," residents of such enclaves were not State residents for voting purposes. *Opinion of the Justices*, 42 Mass. 580; *Sinks* v. *Reese*, 19 Ohio St. 306. By way of contrast, more recent decisions have reached the same result as the district court on this issue. See *Rothfels* v. *Southworth*, 11 Utah 2d 169, 356 P. 2d 612; *Adams* v. *Londeree*, 139 W. Va. 748, 83 S.E. 2d 127; *Arapajolu* v. *McMenamin*, 113 Cal. App. 2d. 824, 249 P. 2d 318.

[3] Appellants' jurisdictional statement argues that appellees: (1) are not part of the unorganized militia and are not subject to compulsory military service at the call of the State; (2) are exempt from the State's compulsory education laws; (3) are exempt from State jury service; (4) are not subject to compulsory commitment in State mental institutions; (5) are not subject to State liquor, minimum price and occupational licensing laws; and (6) are not subject to arrest and prosecution by State authorities for certain offenses committed on the federal reservation. Appellants recognize, however, as they must, that the Federal Assimilative Crimes Act (18 U.S.C. 13) has given the State authority to prosecute acts not punishable by a specific congressional enactment.

property taxes.[4] But individuals residing on property of the federal government, such as the National Institutes of Health, are required to pay income, sales, use, gasoline, and other excise taxes to the State the same as any State resident. They are, moreover, subject to State unemployment insurance and workmen's compensation laws, and may be prosecuted under State criminal statutes for offenses occurring in the federal enclave. Their children attend local schools, and the State courts are open to them for divorce and adoption proceedings. In short, it cannot be maintained that the federal government has *exclusive jurisdiction* over the area. In these circumstances, we submit that State action denying appellees the right to vote solely because they reside on federal property violates the Equal Protection Clause.

APPELLEES ARE DENIED EQUAL PROTECTION BY THE MARYLAND LAW PROHIBITING THEM FROM VOTING IN FEDERAL, STATE AND LOCAL ELECTIONS BECAUSE OF THEIR RESIDENCE IN A FEDERAL ENCLAVE, WHILE THEY ARE SUBJECT TO TAXATION AND OTHER SUBSTANTIAL REGULATION BY THE STATE

1. At the outset, it may be well to emphasize the limited issue presented here. This case does not involve the question whether States can constitutionally establish minimum periods of residence before allowing persons to vote. Thus, *Drueding* v. *Devlin*, 234 F. Supp. 721 (D. Md.), affirmed, 380 U.S. 125, on which appellants rely (J.S. 5), is inapposite. That case concerned the validity of the State's residency require-

[4] Actually, appellants' contention is that residents of the federal enclave have no obligation to pay real property taxes, since there is no personal property tax levied in Maryland.

ment for voting in presidential elections, and did not deal in any way with the entitlement of those living on federal reservations, who met that residency requirement, to vote in federal, State and local elections. Similarly, *WMCA, Inc.* v. *Lomenzo,* 377 U.S. 633 (as explained in *Burns* v. *Richardson,* 384 U.S. 73, 91–92), on which appellants also rely (J.S. 5–6), is irrelevant. *WMCA* and *Burns* did no more than recognize that States could properly exclude certain persons from the voting rolls so long as the classifications necessarily involved were rational ones. Finally, it should be noted, there is no problem of possible mootness here. Accordingly, this Court's recent decision in *Hall* v. *Beals,* No. 39, this Term, decided November 24, 1969, is not pertinent. In that case the Court found moot a challenge to a State residency requirement for voting in presidential elections which had later been amended so that, had it been in effect when the appellants there had moved to Colorado, they would have been entitled to register and vote in the election which, in any event, had already been conducted. The instant controversy—over whether appellants are entitled to be registered to vote in federal, State and local elections in Maryland—remains a live one, since if they are so entitled it is on a continuing basis, without regard to any particular election, and their pleadings were so framed. Moreover, the issue presented is one that requires resolution since it "reflects a continuing controversy in the federal-state area" involving voting rights. *Moore* v. *Ogilvie,* 394 U.S. 814, 816.

It might also be pointed out initially that appel-

lants' contention that the Equal Protection Clause is inapplicable because appellees are not persons within the jurisdiction of the State of Maryland (J.S. 11) assumes the answer to the very question here at issue. Appellees are plainly entitled to the protection of that constitutional provision with respect to those aspects of State authority retroceded to Maryland by the federal government. At issue here is whether the State's effort to differentiate appellees from those not living on federal reservations, in regard to voting in various elections, is grounded on rational considerations and also meets the more stringent "compelling state interest" standard enunciated in several recent decisions of this Court (see *infra,* pp. 9–10, 15–16).

2. Although the States "have broad powers to determine the conditions under which the right of suffrage may be exercised" (*Lassiter* v. *Northampton Election Board,* 360 U.S. 45, 50), the Court has long recognized that classifications made in such statutes must, at the least, be reasonable (see, *e.g., McGowan* v. *Maryland,* 366 U.S. 420, 425–426). Moreover, it has been made increasingly clear that any alleged infringements on the right to vote "must be carefully and meticulously scrutinized" (*Reynolds* v. *Sims,* 377 U.S. 533, 562). And, even more recently, the Court has expressly rejected the "rational basis" test in the voting context, holding that the exclusion of otherwise qualified individuals from the electoral process is constitutionally justifiable only where it is necessary in order to promote a "compelling state interest" (*Kramer* v. *Union School District,* 395 U.S. 621, 627–630; *Cipriano* v. *City*

of Houma, 395 U.S. 701, 704, 706; see, also, *Carrington* v. *Rash,* 380 U.S. 89, 96; *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663, 665, 670; *Williams* v. *Rhodes,* 393 U.S. 23, 29.

In our view, it matters little whether the "rational basis" test or the "compelling state interest" test is applied in the instant case. Under either standard, denial of the franchise to residents of the property of the National Institutes of Health deprives them of the equal protection of the laws guaranteed by the Fourteenth Amendment to the federal Constitution.

3. Under Art. I, Sec. 8, Cl. 17 of the United States Constitution, Congress is empowered to "exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." The land on which the appellees resided was ceded by Maryland to the United States in 1953, with the State reserving the right to serve its civil and criminal processes on the reservation. Earlier cases had held that where the federal government has exclusive jurisdiction over an enclave, persons residing in such enclaves are not State residents for voting purposes (see note 2, *supra*). But those decisions, as well as *Royer* v. *Board of Election Supervisors,* 231 Md. 561, 191 A. 2d 446, certiorari denied, 375 U.S. 921, upon which the appellants rely heavily (J.S. 6, 7, 9, 10), were based on a status which no longer is enjoyed by persons residing in federal en-

claves.[5] Indeed, a look at the legislation returning jurisdiction over federal reservations to the States shows that no adequate argument can any longer be made in order to deny the franchise, in federal, State, and local elections, to residents of federal enclaves like the National Institutes of Health.[6]

a. Since 1948, the Federal Assimilative Crimes Act (18 U.S.C. 13) has provided that, within an enclave, "acts not punishable by an enactment of Congress are punishable by the then effective laws of the State in which the enclave is situated." *United States* v. *Sharpnack*, 355 U.S. 286, 287. That statute not only allows enforcement of State laws enacted before the effective date of the Act, but also those which are subsequently enacted by the State.

b. The so-called "Buck Act" (4 U.S.C. 104 *et seq.*), passed in 1947, retroceded to the States much of the taxing power over residents of federal reservations which had previously been withheld from them. Under this statute, the residents of an enclave are required

[5] In a similar vein, appellants' citation of a number of decisions dealing with the ramifications of exclusive federal jurisdiction (*e.g.*, J.S. 9) is not helpful in resolving the question here posed—against the background of federal retrocession and in the voting context here involved. See, in this regard, *Howard* v. *Commissioners of Louisville*, 344 U.S. 624, 626–627, on which the district court properly relied in this regard (see A. 23–24).

[6] It should be noted that the enactments retroceding jurisdiction to the States were passed prior to 1953, the time when the National Institutes of Health received the land on which appellees live. Therefore, with respect to appellees the State has always had jurisdiction over many of their activities.

to pay State taxes with respect to "sales, purchases, storage, or use of gasoline or other motor vehicle fuels"; a State or its taxing authority is given "full jurisdiction and power to levy and collect" sales and use taxes "in any Federal area within such State * * * as though such area was not a Federal area"; and no resident of a federal enclave "shall be relieved from liability for any income tax levied by any State * * * by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State * * * shall have full jurisdiction and power to levy and collect [income taxes] * * * as though such area was not a Federal area."

c. Federal law makes residents of federal enclaves, such as appellees, subject to state unemployment insurance (26 U.S.C. 3305) and workmen's compensation (40 U.S.C. 290) laws.

d. That the State of Maryland has seen fit to exercise its extensive jurisdiction over the residents at the National Institutes of Health is reflected by the fact that residents of the federal reservation are required to register their automobiles and obtain drivers' permits and license plates in Maryland. The children residing in the enclave attend Montgomery County schools, for which the county receives twice the allotment of federal funds that it receives for children of federal employees who do not reside on federal property (see 20 U.S.C. 236–244, 631–645). And Maryland allows enclave residents to resort to its State courts in divorce and adoption proceedings (see A. 22).

4. In addition to the weight which must be accorded the substantial financial and legal relationships of appellees with the State of Maryland, consideration should be given to the interest which the residents of the National Institutes of Health, as responsible citizens, naturally take in the policies of the county and State surrounding them, policies affecting their lives as well as the lives of their children, policies which they will be unable to influence if they do not have the right to vote. The distinctions advanced by appellants to explain the denial of the franchise to appellees have little relevance to the actual interworking between residents of the National Institutes of Health and the surrounding community. Rather, they appear to be artifiicial differences advanced essentially as afterthoughts to seek to justify an exclusionary voting policy not grounded on rational considerations and certainly not warranted by any "compelling state interest." In view of the critical nature of the important right involved,[1] as well as the particular facts of this case, denial of the franchise to residents of the National Institutes of Health is hardly a reasonable exercise of the State's authority to prevent persons who do not have a bona fide and direct interest from exercising a political voice in community affairs.

Although appellants' point that appellees do not contribute to the county through property taxes is true on its face, in practical effect it is not so substantial as to undermine the holding below. The argument is

[1] See, *e.g.*, *Wesberry* v. *Sanders*, 376 U.S. 1, 17; *Carrington* v. *Rash*, 380 U.S. 89; *Williams* v. *Rhodes*, 393 U.S. 23; *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663.

that whereas other Maryland residents are required to pay property taxes on the land they own, if the residents of a federal reservation owned real property within the enclave, it would not be taxable. Such a situation is not involved in this case, however, as none of the appellees owns land in the reservation. And, although it is possible for a private individual to own land in a federal area, or to lease it, ownership is nonetheless rare. With respect to schools, which are largely supported by property taxes, Congress has made provision for special payments to the State. Moreover, there are many others in the community who neither own nor rent real property,[8] and yet are allowed to vote. Indeed, the very issue involved in *Kramer* v. *Union School District,* 395 U.S. 621, decided last Term, was whether a non-parent who neither owned nor leased real property could be excluded from the voting rolls for school board elections—a situation not far removed from that presented here. There the Court held that such an exclusion violated the Equal Protection Clause.[9] A like result is called for in the instant case.

5. Further elaboration seems unnecessary. The district court's well-reasoned opinion, written before this

[8] Lessees can of course be viewed as contributing indirectly to the payment of real property taxes, since those taxes are undoubtedly taken into account in the fixing of rentals.

[9] See *Cipriano* v. *City of Houma*, *supra*, and the dissenting opinion in the lower court in *Kramer* (282 F. Supp. 70, 75–86); see also this Court's decision in *Carrington* v. *Rash*, 380 U.S. 89, holding invalid a Texas restriction preventing servicemen from voting, *despite* their ownership of real property, unless they had resided in the particular county at the time they entered the service.

Court's decision in *Kramer*, adequately shows that there is no rational basis for excluding appellees from the franchise. At all events, in *Kramer* the Court expressly rejected application of the "rational basis" test in voting cases, and required instead that the "compelling state interest" standard be utilized in such circumstances, saying (395 U.S. at 626–628):

> Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. * * * *Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable.* See *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966). The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. * * * [Emphasis added.]

If the Maryland restriction involved here does not meet the "rational basis" test, as the district court properly concluded, then *a fortiori* the reasons set forth by appellants are insufficient to justify the chal-

lenged statute under the more stringent standard enunciated in the intervening *Kramer* and *Cipriano* decisions.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 236

WILLIAM EVANS, Member of the BOARD OF SUPERVISORS OF ELECTIONS OF BALTIMORE CITY, *et al.*,

Appellants,

v.

TILLYE CORNMAN, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Maryland

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BRIEF OF THE APPELLEES

QUESTIONS PRESENTED

1. Is a tract of land which is located within the geographic boundaries of the State of Maryland, from whose residents the State of Maryland and/or one of its subdivisions collect income, sales, use, unemployment

insurance, gasoline and other motor vehicle fuel taxes and over which the State exercises certain other sovereign powers, to be deemed not part of said State for the purpose of the voting rights of its residents solely because the federal government exercises jurisdiction over the tract under the provisions of Article I, Section 8, Clause 17 of the Constitution of the United States?

2. Where certain apartment dwellers on a tract of land within the geographic boundaries of the State of Maryland pay to the State and its subdivisions the same taxes paid by all other apartment dwellers within the State, may be prosecuted under State criminal statutes, are subject to State unemployment and workmen's compensation laws, and have access to the State courts for divorce and adoption proceedings, does the State's action in depriving these apartment dwellers of their franchise solely because their landlord, the Federal Government, does not pay property taxes to the State and the State courts do not have jurisdiction over offenses committed by them at their place of residence, comport with the requirements of the equal protection clause?

STATEMENT

Approximately thirty-one years ago the Government of the United States established in Montgomery County, Maryland, a medical research center, known as the National Institutes of Health (hereinafter referred to as "NIH").[1] In order to enable the scientists there employed to stay close to their laboratories, the Government subsequently built residential facilities on the tract

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[1] The first buildings were completed in December 1938. U.S. Department of Health, Education and Welfare, Public Health Service, *NIH Almanac 1969* 111 (1969). The NIH tract was ceded to United States jurisdiction in 1953. Md. Code, Art. 96, §34.

it had reserved for the center and rented them to NIH employees and their families.[2] All twelve appellees live in these residential facilities. Ten of them have been registered voters of Montgomery County, Maryland for many years.

On October 19, 1968, the ten appellees who were registered voters were informed by the Permanent Board of Registry of Montgomery County that their names would be removed from the County voters' registry because as residents of an area under exclusive federal jurisdiction they did not qualify for voting in Maryland under the State Constitution. The other two appellees are persons who attempted to register to vote during 1968, but were not permitted to do so for the same reason.

The action of the Permanent Board of Registry was based upon the decision of the Court of Appeals of Maryland in *Royer v. Board of Election Supervisors*, 191 A.2d 446 (Md. 1963), *cert. den.* 375 U.S. 921 (1963). In that case, the court had held that a person residing on a so-called federal enclave located within Maryland was not a resident of the State within the meaning of Article I, Section 1 of the Maryland Constitution,[3] and that he was, therefore, not entitled to the franchise in the State.

Contending that the decision in the *Royer* case violated the equal protection clause of the Fourteenth Amendment to the United States Constituion, appellees sought a declaratory judgment and injunctive relief prohibiting the Montgomery County Board of Registry from

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[2] *Id.* 117-118.

[3] Article I, Section 1 of the Maryland Constitution grants the franchise to every citizen of the United States, twenty-one years of age or more "who has been a resident of the State for one year."

removing the names of the ten appellees already registered and to compel the registration of the two appellees seeking to vote for the first time. A three-judge court was convened pursuant to 28 U.S.C. §2281 to hear the case. On January 29, 1969, the court rendered an opinion which held that the interpretation placed on the word "resident" by the Maryland Court of Appeals in the *Royer* case was indeed violative of the equal protection clause. An order granting appellees the relief sought by them was signed by the court on February 19, 1969.

Defendants below, the Montgomery County Permanent Board of Registry, decided not to appeal the decision of the District Court. Because he felt it necessary to obtain review of that decision, the Attorney General of Maryland filed a motion to intervene in this case and caused the Board of Supervisors of Elections of Baltimore City to join him. The court below, with the consent of the defendants below, and with no objection interposed by appellees, granted the motion to intervene and this appeal followed.

ARGUMENT

I

DENIAL OF THE FRANCHISE DEPRIVES RESIDENTS OF THE TRACT OCCUPIED BY THE NATIONAL INSTITUTES OF HEALTH OF EQUAL PROTECTION OF THE LAWS, IN VIOLATION OF THE FOURTEENTH AMENDMENT.

The basic principles that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment," *Harper v. Virginia Board of Elections*, 383 U.S. 663, 665 (1966), that "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the

State," *Carrington v. Rash*, 380 U.S. 89, 96 (1965), that "if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest," *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) are by now so thoroughly ingrained in the law of the land that it is, at first blush, surprising that the issue which this case presents requires further consideration by this Court. On closer examination it develops, however, that during the early years of the Republic the concept evolved that areas within the exterior boundaries of a state which are under the "exclusive jurisdiction" of the United States should be considered separate and apart from the State and that the residents of such areas should not be considered residents of the State. See *Commonwealth v. Clary*, 8 Mass. 72 (1811).

The District Court noted that there has been a major change in the legal status of federal enclaves since the concept of enclave extraterritoriality was first evolved. Given the fact that the State of Maryland now exercises significant sovereign powers over the NIH tract, the tract in issue here, the court concluded that its residents must be treated as residents of the State for voting purposes.

Appellants have suggested that this decision infringes on the power of the United States to exercise "exclusive jurisdiction" over the tract. That contention, it is respectfully submitted, misses the point of the District Court's opinion. Appellees readily concede that the NIH tract is one over which the United States continues to exercise "exclusive jurisdiction" under the provisions of Article I, Section 8, Clause 17 of the Constitution of the United States. The issue posed by the decision below is not whether the United States still

possesses "exclusive jurisdiction" within the meaning of Clause 17, but what such "exclusive jurisdiction" means, how it is exercised and what consequences flow from the manner in which it is exercised.

The purpose of the framers of the United States Constitution in granting Congress the power "to exercise exclusive Legislation in all Cases whatsoever. . . . over all Places purchased by the Consent of the legislature of the State . . . . for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings" was to enable the Federal government to protect its facilities against unfriendly residents of the several states.[4] But the concerns which motivated the framers are no longer applicable to the relationship between the Federal Government and the states. In recent decades Congress has increasingly permitted state authority to be exercised on federal enclaves. The issue posed by this case is whether the entry of the state onto federal enclaves has not wrought a fundamental change in the legal rights of enclave residents.

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[4] In *Fort Leavenworth R. R. Co. v. Lowe*, 114 U.S. 525 (1885), this Court explained the origin of Clause 17 as follows:

> "The necessity of supreme legislative authority over the seat of government was forcibly impressed upon the members of the Constitutional Convention by occurrences which took place near the close of the Revolutionary War. At that time, while Congress was in session in Philadelphia, it was surrounded and insulted by a body of mutineers of the Continental Army. In giving an account of this proceeding, Mr. Rawle, in his treatise on the Constitution, says of the action of Congress: 'It applied to the executive authority of Pennsylvania for defense; but, under the ill-conceived Constitution of the State at that time, the executive power was vested in a council, consisting of thirteen members, and they possessed or exhibited so little energy, and such apparent intimidation, that the Con-

(Cont'd on p. 7)

A. The Legal Doctrine That Federal Enclave Residents Do Not Have The Right To Vote Stems From A Time When Federal Enclaves Were Indeed Totally Removed From State Jurisdiction.

In the early years of the Republic, the "exercise of exclusive legislation" meant that only the laws of Congress, and no other laws, were applicable on tracts under exclusive federal jurisdiction. The issue of whether residents of such tracts have the right to vote was first raised in 1840, when the Supreme Judicial Court of Massachusetts was called upon by the Massachusetts House of Representatives to determine (1) whether the residents of federal enclaves are entitled to the benefits of the public schools of their respective towns, (2) whether such residents are subject to local poll or state taxes, (3) whether they are legal inhabitants of their towns, and (4) whether they had the right to vote. *Opinion of the Justices*, 1 Met. 580 (1840).

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4 (Cont'd)

> gress indignantly removed to New Jersey, whose inhabitants welcomed it with promises of defending it . . . . The general dissatisfaction with the proceedings of the executive authority of Pennsylvania, and the degrading spectacle of a fugitive Congress, suggested the remedial provisions now under consideration.' Rawle, p. 113. . . . Upon the second part of the clause in question, giving power to 'exercise like authority' that is, of exclusive legislation 'over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings,' the Federalist observes that the necessity of this authority is not less evident. 'The public money expended on such places,' it adds, 'and the public property deposited in them, require that they should be exempt from the authority of the particular State.' "

In responding to these questions the Supreme Judicial Court pointed to the analogy between Federal enclaves and "the district ceded to the United States for the seat of Government." It went on to hold that

> "[W]here the general consent of the Commonwealth is given to the purchase of territory by the United States. . . . and where there is no other condition or reservation in the act granting such consent, but that of a concurrent jurisdiction of the State for the service of civil process, and criminal process against persons charged with crimes committed out of such territory – the government of the United States has the sole and exclusive jurisidiction over such territory, *for all purposes of legislation and jurisprudence, with the single exception expressed,* and consequently, that no persons are amenable to the laws of the Commonwealth for crimes and offences committed within said territory, and that persons residing within the same do not acquire the civil and political privileges, *nor do they become subject to the civil duties and obligations of inhabitants of the towns within which such territory is situated."* (Emphasis supplied.) 1 Met. at 583.

The court concluded that for the reasons stated the enclave residents were not entitled to the benefits of the local public schools, were not subject to state and local taxes, were not residents of the state for the purpose of qualifying for relief payments and were not entitled to vote.

And so the legal doctrine contended for by appellants was born. It was reinforced twenty-nine years later by the Supreme Court of Ohio in *Sinks v. Reese,* 19 Ohio St. 306 (1869).

Sinks v. Reese involved a disputed election in which a number of challenged votes were cast by residents of an institution known as "The National Asylum for Disabled Volunteer Soldiers." The Asylum was federal property and under exclusive federal jurisdiction. After discussing the nature of the institution, the Ohio Supreme Court asked the crucial question: "[W]hat is the legal status of persons who become residents upon the grounds, and within the limits, of the institution thus within the exclusive jurisdiction, and how does it affect their claim to exercise the elective franchise in Ohio, under its constitution and laws?"

To this question the court supplied the following answer:

> "By becoming a resident inmate of the asylum, a person, though up to that time he may have been a citizen and resident of Ohio, ceases to be such; *he is relieved from any obligation to contribute to their revenues, and is subject to none of the burdens which she imposes upon her citizens.* He becomes subject to the exclusive jurisdiction of another power, as foreign to Ohio as is [sic] the states of Indiana or Kentucky, or the District of Columbia. The constitution of Ohio requires that electors shall be residents of the state; but under the provisions of the constitution of the United States, and by the consent and act of cession of the legislature of this state, the grounds and buildings of this asylum have been detached and set off from the state of Ohio, and ceded to another government, and placed under its exclusive jurisdiction for an indefinite period. We are unanimously of the opinion that such is the law, and with it we have no quarrel; *for there is something in itself unreasonable that men should be permitted to par-*

ticipate in the government of a community, and in the imposition of charges upon it, in whose interests they have no stake, and from whose burdens and obligations they are exempt. (Emphasis supplied) 19 Ohio St. at 401.

The thread which runs through these leading cases, it will be noted, is the clear distinction between the enclave residents and the other residents of the state not only in terms of criminal jurisdiction but also in terms of their status as taxpayers. Enclave residents not only lived on tax-exempt land but were, beyond that, not subject to any form of state taxation, including taxes otherwise unrelated to the ownership of the land on which the taxpayer resides. Both courts emphasized that enclave residents were not subject to the "obligations" of other residents of the state and, therefore, should not share their privileges. The only relationship to the state which they shared was that they were subject to the service of civil process and of criminal process for offenses committed outside the confines of the enclave.

Thus, the Massachusetts and Ohio cases stand for the proposition that where the exclusive federal jurisdiction reserved by the Constitution is fully exercised, enclave residents do not have the right to vote. Nothing contained in the decision below is in conflict with that principle.

B. Federal Legislation Enacted In Recent Decades Has Changed The Status Of Federal Enclave Residents So Drastically As To Remove The Foundation On Which The Federal Enclave Doctrine Rested.

But the fact situation obtaining in 1840 and 1869 does not prevail any longer. What developments of recent decades have shown is that the Congress, while still possessing "exclusive jurisdiction" in the sense that it has the power at any time to oust all other sovereigns and

assert sole legislative authority, may admit another sovereignty, namely that of the State, to exercise governmental powers within a federal enclave for such time and to such extent as it permits. As the court below observed, "the concept of exclusive federal jurisdiction over reservations such as the one here involved has been drastically altered within the past 40 years." A. 22. Thus the power of exclusive jurisdiction, as granted by the Constitution, is indeed, as appellants put it," "unimpaired and unencumbered." Appellants' Br. 18. But Congress need not exercise that power to the fullest extent at all times and is not doing so now.

As the District Court points out, Congress enacted between 1928 and 1949 a series of laws which as long as they are in effect grant substantial powers to the states over the affairs of persons living on federal enclaves. A. 21. Thus a state's wrongful-death statute applies on federal enclaves located within the state's exterior boundaries. 16 U.S.C. §457. Workmen's compensation laws of the states now extend to federal enclaves. 40 U.S.C. §290. State gasoline and other motor vehicle fuel taxes must be paid on fuels sold in an enclave. 4 U.S.C. §104. State unemployment insurance laws are now in force on enclaves. 26 U.S.C. §3305(d). Since 1940 state sales, use and income taxes apply on federal enclaves to the same extent as they do at all other locations within the exterior boundaries of the state in question. 4 U.S.C. §§105-110. A lessee's interest in real estate within an enclave may also be taxed by the state. 10 U.S.C. §2667(e). While crimes committed on federal enclaves are prosecuted in the federal courts, it is the laws enacted by the state legislature which apply to most offenses through the Assimilative Crimes Act, 18 U.S.C. §13.

The concept of "exclusive federal jurisdiction" thus no longer means that only one sovereign, the Federal Government, governs on a federal enclave. It means,

instead, merely that the Federal Government has the power to govern to the exclusion of all other sovereigns, a power which it is not required to exercise to the fullest extent. Assuming, therefore, that *Opinion of the Justices* and *Sinks v. Reese* are an accurate statement of the law where exclusive federal jurisdiction is exercised completely, the question must be considered whether it is equally applicable in situations in which the Federal Government has permitted the state to enter and exercise broad governmental powers, particularly in the area of taxation.

While the court below was undoubtedly aware of the holding of this Court that the franchise cannot be conditioned on the payment of a tax, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), it did not think that the obverse was true, namely that the fact that they were subject to State taxation at their places of residence had no bearing on their right to vote. The court was aware of the fact that appellees are liable to pay the taxes and other charges which fund 50% of the education operating budget of Montgomery County and 88% of the operating budget for other County services. A. 24. It was undoubtedly also aware of the fact that the taxes for which appellees are liable also fund the operating budget of the State of Maryland.[5] Viewing the entire range of powers exercised by the State of Maryland over the NIH enclave and considering that "the elective franchise has always been considered one of the most basic of those rights, enjoyed by a citizen of a free democratic society," the District Court concluded that "the plaintiffs here are treated by the State of Maryland

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[5] The State's major sources of revenue from individual taxpayers are the retail sales tax, Md. Code, Art. 81, §§324 ff., the use tax, *Id.* §§372 ff., the income tax, *Id.* §§279 ff., and the motor vehicle fuel tax, *Id.* Art. 56 §§135 ff.

as state residents to such an extent that it is a violation of the Fourteenth Amendment for the State to deny them the right to vote . . . ." A. 25.

The essence of the District Court's holding is thus that the Federal Government's grant of authority to the State of Maryland over the NIH enclave and the State's exercise thereof has as its Constitutional consequence the acquisition of the franchise by enclave residents. *Opinion of the Justices* and *Sinks v. Reese* were bottomed on the proposition that enclave residents who have no obligations to the State in which the enclave is located have, by the same token, no rights against the State. Is the legal conclusion of these cases defensible where the facts on which they are premised no longer obtain? The concept of the total extraterritoriality of federal enclaves, the keystone of the Massachusetts and Ohio decisions, has in recent times been repudiated by this Court, which labeled it a "fiction". *Howard v. Commissioners of Louisville*, 344 U.S. 624, 627 (1953). In the context of the voting rights of enclave residents the applicability of the extraterritoriality doctrine to modern conditions was seriously questioned in *Arapajolu v. McMenamin*, 249 P.2d 318 (Calif. D. Ct. App. 1st D. 1952), see also *Adams v. Londeree*, 83 S.E. 2d 127 (W. Va. 1954) and *Rothfels v. Southworth*, 356 P.2d 612 (Utah 1960). The court below agreed with this line of recent cases and held that the obligations of enclave residents to the State were now so great and the exemptions from obligations so relatively insignificant as to require the grant of the franchise to such residents.

Appellants' response is to minimize the present obligations which the enclave residents have to the State and to allege that they are "relieved of many of the obligations of State citizenship." Appellants' Br. 20. The "escaped obligations" are identified as "freedom from real estate, severance, personal property, and other state

taxes. . . ; freedom from state regulatory and licensing legislation; freedom from service in the militia; freedom from compulsory education laws; and freedom from jury service." *Id.* 20-21.

The lower court has considered this contention and has rejected it:

> "It is no answer to say that there are many rights and obligations of citizens of Maryland which are not enjoyed by or have not been assumed by these plaintiffs. Without determining which way the scales would tip with respect to other rights, we are of the opinion that the incidents of jurisdiction exercised by Maryland over these plaintiffs are sufficiently weighty that the important right claimed here cannot be constitutionally denied." A. 25-26.

What the District Court viewed in balancing the scales was the real world in which the appellees and persons similarly situated live, not the abstraction conjured up by appellants. For the great majority of citizens of the State of Maryland the phrase "obligations of state citizenship" entails the payment of taxes to the State and its subdivisions, the registering of one's automobile with the State and the obtaining of a State driver's license. These obligations are borne by the appellees just as they are borne by other residents of Montgomery County and the State of Maryland.

More specifically, the taxes which appellants pay to the State and to Montgomery County, sales, use, income, and gasoline taxes, are the taxes paid by every other apartment dweller, or tenant of property owned by third parties in the County and the State. As already noted, the taxes for which appellees are liable, fund the operating budget of the State, 50% of the County school operating budget and 88% of the County's operating budget for other services.

It is conceded that appellees' landlord, the United States, does not pay real property taxes to the State or County, the taxes which fund the capital budgets of the State and County and portions of the County's operating budgets. It should be noted, however, that in lieu of taxes, the United States pays to Montgomery County so-called "impacted areas aid" for the education in the Maryland public schools of children of federal enclave employees. 20 U.S.C. §236 *et seq.* Moreover, clergymen and other residents of parsonages and persons living on the grounds of hospitals and other charitable institutions live on real estate exempt from real property taxation, Md. Code, Article 81, §9(4) and (7), yet do not forfeit their right to vote. Failure to pay the real property tax has been held by this Court to be insufficient ground for denial of the right to vote in a bond referendum. *Cipriano v. Houma,* 395 U.S. 701 (1969). How could it possibly justify denial of the right to vote for President of the United States?

The reasons for disregarding appellants' "freedom from real estate taxation" for purposes of this case are equally applicable to the other taxes referred to by appellants. Beyond that it should be noted that such taxes as the severance and personal property taxes, which are mentioned by appellants, are in the context of the residents of the NIH tract abstractions rather than an aspect of the real world for the simple reason that they would, at this time, affect neither them nor persons similarly situated.[6]

Similarly unreal are the other "freedoms" listed by appellants. There is doubt whether the "freedom from regulatory and licensing legislation" has any meaning for

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[6] Residents of Montgomery County pay no severance tax nor do they, as individual householders, pay a personal property tax.

appellees, who register their cars in Maryland and obtain drivers' licenses from the State.[7] The unorganized militia of the State, Md. Code, Art. 65, §5, has, as far as appellees have been able to determine, never been called out by the Governor of the State.[8] The "freedom" from the compulsory education laws, for which appellants cite no authority, is one of which appellees would most certainly not wish to avail themselves.[9] The argument that appellees are free from the requirement of jury service is circular as Maryland law now requires the selection of jurors from voter registration lists. Md. Code, Art. 51, §3.

The inescapable conclusion which must be drawn from the state of facts here obtaining is that appellees are in every meaningful way residents of Montgomery County and the State of Maryland. (See Stipulation, A. 14-15 for illustrations from their daily lives of their integration into the Montgomery County community.) To suggest that Old Georgetown Road or Wisconsin Avenue separate them from the State of Maryland is to resurrect the fiction which this Court interred in *Howard v. Commissioners of Louisville, supra.*

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[7] Appellee Celia W. Tabor obtained a Maryland license to practice medicine while residing on the NIH tract. A. 15. Appellants' assertion seems to refer to the holding of this Court in *Paul v. United States,* 371 U.S. 245 (1963), a decision which cannot conceivably have any bearing on the relations between appellees and the State of Maryland.

[8] It should be noted that six of the appellees are not part of the unorganized militia because they are female. Md. Code, Art. 65, §1. Five of the six male appellees may be exempt not because they are residents of a federal enclave but because they are employees of the Federal Government. *Ibid.*

[9] At least four of them have been members of Parent-Teachers Associations in Montgomery County. A. 14-15.

Nothing asserted here nor decided by the court below suggests that Maryland does not possess the power to establish residence requirements as a prerequisite to voting. As this Court observed in *Carrington v. Rash, supra*, "Texas has the right to require that all military personnel enrolled to vote be bona fide residents of the community." 380 U.S. at 93-94. "But," the Court continued, "if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation," *Id.* at 94.

Appellees, it is respectfully submitted, are bona fide residents of Maryland. They happen to live on land which is free of real property taxation.[10] Though they may not be prosecuted in the Maryland courts for crimes committed at their place of residence, they are subject to the criminal laws of Maryland. They have "a right to an equal opportunity for political representation." There is no "compelling state interest" to deny them the franchise.

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[10] Appellants suggest that if Congress retroceded jurisdiction over the NIH enclave, appellees would have the right to vote. Appellants' Br. 26. If that did occur, the real property on which they live would still be tax-exempt. It would thus appear that appellants' contention that appellees are to be deprived of their vote because of the tax status of the land on which they live is a mere make-weight and that the essence of appellants' argument is that the absence of State criminal jurisdiction over the NIH enclave is the sole ground for depriving appellees of the right to vote. In this context it should be noted that the states do not, with few exceptions, have criminal or civil jurisdiction over Indians on Indian reservations, see *Williams v. Lee*, 358 U.S. 217 (1959), *Seymour v. Superintendent*, 368 U.S. 351 (1962). Yet the right of Indians resident on such reservation to vote has been uniformly upheld, *Trujillo v. Garley* (D.N.M 1948) (unreported decision; three-judge court), *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948), *Montoya v. Bolack*, 372 P.2d 387 (N.M. 1962).

II

AS RESIDENTS OF THE NATIONAL INSTITUTES OF HEALTH TRACT ARE COUNTED AS MARYLAND RESIDENTS FOR CENSUS PURPOSES, DENIAL OF THEIR FRANCHISE VIOLATES SECTION 2 OF THE FOURTEENTH AMENDMENT.

In denying NIH residents the right to participate in Maryland elections, the State has not only violated the equal protection clause but its representation in Congress violates Section 2 of the Fourteenth Amendment. Section 2 requires that whenever the right to vote "is denied to any male inhabitants of such State, being twenty-one years of age, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

NIH residents are included in the decennial census which determines Maryland's representation in the House of Representatives. See A. 14. The constitutional issue raised by that fact was recently under judicial consideration in *Lampkin v. Connor*, 239 F. Supp. 757, 764 (D.D.C. 1965). In *Lampkin*, citizens of various states, some of which are allegedly under-apportioned and some of which were allegedly over-apportioned, sought to compel the United States Department of Commerce to comply with Section 2 in computing the apportionment of the House. The District Court dismissed the complaint for lack of standing. The Court of Appeals affirmed, but in so doing took note of specific legislation passed by Congress to alleviate the grounds of the complaint. The Court of Appeals pointedly concluded its opinion by informing the complainants that while "events have made their complaint unsuitable for judicial disposition at this time, we think it is also premature to conclude that

Section 2 of the Fourteenth Amendment does not mean what it appears to say." *Lampkin v. Connor*, 360 F.2d 505, 512 (D.C. Cir. 1966).

It is respectfully submitted that any doubt which may remain after consideration of the applicability of the equal protection clause to the claim for voting rights here asserted should be resolved in favor of a determination which provides for conformity of Maryland's representation in the House of Representatives with the requirements of Section 2 of the Fourteenth Amendment.

CONCLUSION

Appellants contend that affirmance of the decision below "would be inherently unfair to the states because it would permit persons to vote who are neither liable for many local taxes nor in many instances are subject to the authority of the very persons for whom they may vote." Appellants' Br. 27. What appellants seem to ignore is that under their theory appellees are completely deprived of any opportunity of voting for President and Vice President, for the United States Senate and the United States House of Representatives, thus for officials who have as much authority over them as they have over any other resident of the State of Maryland. They would also be deprived of the opportunity of voting for the Governor of the State in whose midst they live and to whose authority they are closely tied. They would be deprived of the opportunity of voting for the state legislators who levy all the taxes paid by them and frame the civil and criminal laws applicable to them, for the board of education which operates the schools their children attend. Of the more than fifty public and party officials which appellees would have the right to elect, only one, the State's Attorney for Montgomery County, can be said to have no authority whatever over their place of residence.

Considering the broad sweep of the State's exclusion of appellees from the franchise and the thin reed on which it leans, appellants' justification not only fails to measure up to the standards set by the majority of the Court in cases such as *Harper v. Virginia Board of Elections, supra,* and *Kramer v. Union Free School District, No. 15, supra,* but also does not meet the requirements of the minority, as stated in the dissent of Mr. Justice Harlan in the *Harper* case:

> "The Equal Protection Clause prevents States from arbitrarily treating people differently under their laws. Whether any such differing treatment is to be deemed arbitrary depends on whether or not it reflects an appropriate differentiating classification among those affected; the clause has never been thought to require equal treatment of all persons despite differing circumstances. The test evolved by this Court for determining whether an asserted justifying classification exists is whether such a classification can be deemed to be founded on some rational and otherwise constitutionally permissible state policy." 383 U.S. at 681.

The fact that if one of appellees were to commit a crime at his place of residence he would be subject to arrest by the Federal Bureau of Investigation rather than the Montgomery County police and subject to prosecution by the United States Attorney in the federal courts rather than by the State's Attorney in the state courts cannot be the basis of a "rational and otherwise constitutionally permissible state policy" depriving him completely of his right to vote.

That this deprivation of the vote would be absolute and complete deserves special emphasis. In *Carrington v. Rash, supra,* it will be recalled, the Court considered a provision of the Texas Constitution which merely had

the effect of preventing "a person entering military service as a resident citizen of another state from acquiring a voting residence in Texas during the period of military service." *Carrington v. Rash*, 378 S.W.2d 304, 305 (Tex. 1964). Presumably such military personnel could still vote at their place of residence at the time they entered the armed forces. This Court's decision accorded them the privilege of giving up their previous voting residence and voting in Texas. Appellees in the instant case would not have similar options. Appellants are not disputing that appellees have established a residence on North Drive and Center Drive in Bethesda, but argue that North Drive and Center Drive are not part of Maryland but are part of "[t]he fiction of a state within a state." *Howard v. Commissioners of Louisville*, 344 U.S. at 627. If appellees cannot vote in Maryland, they cannot vote anywhere.

It is indeed true, as appellants point out, that efforts have been made in the past to resolve the injustice at issue here through legislative action and through amendment of the Maryland Constitution. It is also true that these efforts have failed. No citation of authority is necessary for the fundamental proposition that a citizen need not wait for legislative action to vindicate a right given him by the Constitution of the United States.

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 236

WILLIAM EVANS, ETC., ET AL.,
Appellants,

v.

TILLYE CORNMAN, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

REPLY BRIEF OF THE APPELLANTS

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REPLY BRIEF OF THE APPELLANTS

ARGUMENT

THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE THAT RESIDENTS OF FEDERAL ENCLAVES, OVER WHICH CONGRESS RETAINS EXCLUSIVE JURISDICTION, BE AFFORDED THE RIGHT TO VOTE IN THE STATE IN WHICH THE ENCLAVE IS SITUATED.

In its original brief the Appellants demonstrated (at pp. 13-22) the instability of both of the premises upon which the lower court based its opinion; namely that:

1. The legislative retrocessions by Congress have not in any way limited the continuing exclusive federal jurisdiction over the enclaves in question.
2. The limited legislative activity of the State of Maryland with respect to residents of federal enclaves

does not require the State to extend voting rights to these residents.

The Appellees, in their recently filed brief, appear to have conceded the correctness of the Appellant's position on the first point.

At page 11 of their brief the Appellees state that "the power of exclusive jurisdiction, as created by the Constitution, is indeed, as Appellants put it, 'unimpaired and unencumbered' ". Curiously, the Solicitor General, the Appellees' newly found ally, takes an entirely different tack on this very point. At page 7 of his *amicus curiae* brief the Solicitor General states that "[i]n short, it cannot be maintained that the federal government has *exclusive jurisdiction* over the area." To make matters more confusing, the Appellees' position on this point represents a marked departure from that taken by the court below, which position appears to be a middle ground between that of the Appellees and that of the Solicitor General (A. 20-22).

With further reference to this first point, the limited authorities relied upon by the Appellees have already been fully distinguished by the Appellants in their brief. *Howard v. Commissioners of Louisville*, 344 U.S. 624 (1953), cited by the Appellees at pp. 13, 16 and 21, was distinguished at pp. 16-18 of the Appellants' brief. *Carrington v. Rash*, 380 U.S. 89 (1965), cited by the Appellees at pp. 5, 17 and 20 of their brief, was distinguished at page 21. The Appellees also appear to place some reliance upon *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969), and *Cipriano v. City of Houma*, 395 U.S. 701 (1969). In citing these two cases and in arguing (as they do at page 15 of their brief) that Appellees find themselves in a situation analogous to that of "clergymen and other residents of parsonages and persons living on the grounds of hospitals

and other charitable institutions," the Appellees entirely lose sight of the fact that the distinction involved in the case at hand is not between *property owners and non-property owners* but rather between *residents and non-residents* of the State of Maryland.

The Appellees are required to pay State income taxes, sales and use taxes and motor vehicle fuel taxes (pp. 12-15 of Appellees' brief), yet say that they are "deprived of the opportunity of voting for the state legislators who levy all the taxes paid by them" (p. 19). This "taxation without representation" argument was earnestly put forth in *Royer v. Board of Election Supervisors,* 191 A. 2d 446 (Md. 1963), cert. den. 375 U.S. 921 (1963), and was specifically found to be unpersuasive by the Court of Appeals of Maryland (at page 449 of the opinion).

More recently, this identical argument was made by certain residents of the District of Columbia, who urged that the system by which the President appointed three commissioners for the District of Columbia was unconstitutional. The District of Columbia is, of course, also a federal enclave by virtue of the "Seat of the Government" language of Article I, Section 8, Clause 17 of the United States Constitution, which same clause is under discussion in the case at hand. In *Hobson v. Tobriner,* 255 F. Supp. 295 (D.D.C. 1966), petition for review for mandamus denied sub nom., *Hobson v. Gasch* (D.C. Cir. No. 20,838, decided 1966), cert. den. 386 U.S. 914 (1967), the Court rejected the argument that it was unconstitutional for "residents of the District of Columbia [to be] subjected to taxation without representation" pointing out that "the Supreme Court has repeatedly upheld the power of Congress to pass such legislation" (p. 298), citing *Heald v. District of Columbia,* 259 U.S. 114 (1922), and eight other cases beginning with the decision of Chief Justice Marshall in

Loughborough v. Blake, 5 Wheat. 317 (1820). The Court went on to correctly point out (at page 297) that "the effect of cession upon individuals was to terminate their state citizenship [in Maryland and Virginia] and the jurisdiction of the state governments over them." In a related case the Court of Appeals for the District of Columbia found to be "insubstantial" the constitutional claims that "citizens [of the District of Columbia] had not been given opportunity to elect persons by popular vote" as members of the District of Columbia Council and as Mayor-Commissioner. *Carliner v. Commissioner of the District of Columbia*, 412 F. 2d 1090 (D.C. Cir. 1969), cert. den. 38 U.S. L. Week 3219 (Dec. 15, 1969).

These cases not only lay to rest Appellees' "taxation without representation" argument but also stand for the proposition that residents of federal enclaves cease to be residents of the ceding state and possess only such voting rights as have been afforded them by constitutional amendment or congressional action. To the same effect see House Report No. 1698 (1960 *U.S. Code Cong. and Adm. News* 1459), explaining the then proposed 23rd Amendment to the United States Constitution permitting residents of the District of Columbia to vote in national elections for President and Vice President of the United States.

It is interesting to note that in the *Hobson* case the Solicitor General strenuously *opposed* the petition for writ of certiorari filed by the residents of the District of Columbia. In contrast to the position he supports in the pending case, the Solicitor General (at page 4 of his Memorandum for the Respondent in Opposition) challenged the proposition that "representation is inseparable from taxation" and urged that the quantum of voting rights afforded to citizens of the District of Columbia rests squarely within the discretion of Congress. This position is entirely

in harmony with the Appellants' view of the case at hand. See pages 22-27 of the Appellants' brief. The final paragraph of the Solicitor General's Memorandum in the *Hobson* case exactly parallels the view of the present case taken by the Appellants and for this reason merits full quotation (page 6):

> "Finally, the position here espoused should not in any way be viewed as one indicating any opposition by the executive branch to Congress' determining to provide for home rule for the District. Indeed, the President has publicly commended the enactment of such legislation to Congress on several occasions in the recent past. Such a decision however, is beyond peradventure constitutionally committed to Congress, and not to the judicial or executive branches."

CONCLUSION

For the reasons put forth in its original brief and in this reply brief, the Appellants earnestly contend that the decision of the lower court should be reversed.

Respectfully submitted,

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January 19, 1970

PROOF OF SERVICE

I HEREBY CERTIFY that on this 19th day of January, 1970, I mailed by first class mail, postage prepaid, a copy of the Reply Brief of the Appellants, to Richard F. Schifter, Esquire, Strasser, Spiegelberg, Fried, Frank & Kampelman, 1700 K Street, N.W., Washington, D.C. 20006, Attorney for the Appellees, and to Francis X. Beytagh, Jr., Esquire, Assistant to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

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